2006

Sergio Pruneda and Iris Pruneda v. Columbia Steel Casting Co : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SERGIO PRUNEDA and IRIS PRUNEDA as Parent and Guardian of ANTHONY PRUNEDA, DONOVAN PRUNEDA, SERGIO PRUNEDA, JR., COZY PRUNEDA, MATTHEW PRUNEDA, and ZENNIA PRUNEDA, minor children, Plaintiffs, vs. COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, and RICHARD D. GRAY, Defendants.	**BRIEF OF APPELLANTS** Appellate Case No. 20060598-CA

Appeal from a Judgment following a jury trial, entered by the Fourth Judicial District Court for Utah County, The Honorable Fred D. Howard, presiding.

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I

PARTIES TO THE PROCEEDING

The Parties to this proceeding are:

Sergio Pruneda and Iris Pruneda as parent and guardian of Anthony Pruneda, Donovan Pruneda, Sergio Pruneda, Jr., Cozy Pruneda, Matthew Pruneda, and Zennia Pruneda, minor children.	Plaintiffs/Appellants
Columbia Steel Casting Co., Inc., an Oregon Corporation, and Richard D. Gray.	Defendants/Appellees

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STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. Does Utah Code Ann. § 31A-22-309 define a "significant" injury such that a person who meets the statutory threshold of § 31A-22-309 is entitled to recover more than "nominal damages?"

2. Can a jury lawfully award no general damages to a victim of an accident whose special medical damages exceed the statutory threshold for serious injury established by Utah Code Ann. § 31A-22-309?

3. Did the trial court abuse its discretion when it allowed Dr. Clarke to testify at trial as an expert witness?

4. Did the trial court abuse its discretion when it allowed Dr. France to testify at trial as an expert witness?

5. Did the trial court err when it determined that plaintiffs' treating doctor, Dr. Gordon McClean, could not give his opinion on causation because he did not provide an expert report under Rule 26(a)(3)(B)?

6. Did the trial court abuse its discretion when it struck testimony of the treating physician, Dr. McClean, which was elicited without objection, and then gave an instruction to the jury to disregard such testimony?

7. Did the trial court abuse its discretion in requiring redaction of references to the source of injuries from the treating physician's medical records prior to admitting them?

Issues one, two and five are questions of law, and are reviewed for correctness. *Orton v. Carter*, 970 P.2d 1254, (Utah 1998); *State v. Pena*, 869 P.2d 932 (Utah 1994).

Issues three and four are questions left to the discretion of the trial court and are determined by an abuse of discretion standard. *State v. Pena, supra*.

Issues six and seven are mixed issues of law and fact which are examined for correctness because they were based upon the court's erroneous interpretation of Rule 26(a)(3), Utah Rules of Civil Procedure. *State v. Pena, Id.*

These issues were preserved for appeal in Plaintiffs' Motions in Limine and supporting memoranda filed December 30, 2004, R. 114-203; in objections to the testimony of Dr. France and Dr. Clarke made at trial, R. 774 at 125, 133, 137-165, 190; R. 775 at 47-48, 52-53, 57; in plaintiffs' opposition to defendants' Motion in Limine regarding Dr. McClean's testimony made at trial, R. 773 at 38-55; in objections to the court's sustaining defendants' objection to testimony of Dr. McClean from his records, the striking of such testimony, the giving of a curative instruction, and the requirement that references to treatment for injuries caused by the collision be redacted from Dr. McClean's records. R. 773 at 133-148.

VI

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

1. Utah Code Ann. § 31A-22-309.

2. Rule 26(a)(3), Utah Rules of Civil Procedure.

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VII

STATEMENT OF THE CASE

A. Nature of the Case

Appellants, Sergio Pruneda and Iris Pruneda, as parent and guardian of Anthony Guererro, Donovan Guererro[1], Sergio Pruneda, Jr., Cozy Pruneda, Matthew Pruneda, and Zennia Pruneda (hereinafter "the Prunedas"), each brought an action for negligence. They claimed the Appellee, Richard D. Gray (hereinafter "Gray"), negligently drove a Dodge Durango, owned by his employer, Columbia Steel Casting Company (hereinafter "Columbia"), into the back of the Prunedas' car. Sergio Pruneda filed an action, case number 030402552. Iris Pruneda, as guardian for the children filed a separate action, case number 030403709. The two actions were consolidated on December 15, 2003, by order of the trial court. R. 56.

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[1]Anthony and Donovan were born before Sergio and Iris were married, but are family members and also known as Anthony and Donovan Pruneda.

The force of the collision caused the Pruneda car to shoot forward into the rear of a Nova driven by Mr. Perez. The force knocked the Perez car through the intersection.

Columbia was named as a defendant because Gray was acting in the course of his employment. Columbia does not dispute the claim.

The accident happened on State Street (highway 89) and 300 East in Pleasant Grove, Utah on July 31, 2002. Sergio Pruneda and the Pruneda children all received injuries in the collision. They were treated briefly at a clinic in Linden, Utah through August 12, 2002. They began treatment with Dr. Gordon McClean on August 14, 2002.

Dr. McClean first examined Sergio and his children on August 14, 2002. He diagnosed neck and back injuries. He treated Sergio until December 30, 2002. Two of the children, Matthew and Zennia reached maximum medical improvement ("MMI") by December 9, 2002 and were released. The other four children, Anthony and Donovan Guererro and Cozy and Sergio, Jr. reached MMI in May of 2003, and were released.

Gray and Columbia claim that the collision did not significantly injure Sergio or his children. There was no claim at trial regarding any pre-existing injuries.

Prior to trial, defendants hired Dr. Jayne Clarke to render opinions on the question of whether or not the treatment received by Sergio and his children was reasonable and necessary, and whether Sergio and the children had suffered any injuries in the collision. R. 104. Dr. Clarke never examined Sergio or any of his children. R. 775 at 90.

The Prunedas filed a Motion in Limine with accompanying Memorandum on December 30, 2004, asking the Court to preclude testimony by Dr. Clarke on the issue of

reasonableness of the treatment provided by Dr. McClean. R. 115-163. Plaintiffs claimed Dr. Clarke, an M.D., lacked the necessary training and experience to opine on the reasonableness and necessity of the chiropractic care provided by Dr. McClean. Prunedas' Motion in Limine was denied. R. 465. Dr. Clarke was allowed to testify at trial regarding the care and treatment rendered by Dr. McClean. R. 775 at 26-131.

Prior to trial, Gray and Columbia hired Dr. Paul France to render opinions on the impact speed of the Durango striking the Pruneda car, and the forces generated in the collision. R. 104.

On December 30, 2004, the Prunedas filed a Motion in Limine to preclude testimony by Dr. France, claiming the methodology he used to reach his conclusions was untested, unreliable, and had never been shown to produce accurate replicable results. In addition, even if the methodology was reliable, there was insufficient evidence in this case to allow him to reach a reliable conclusion. The Court denied the motion, but said a hearing would be held at trial to determine whether there was sufficient foundation to allow Dr. France to render his opinions. R. 463-66.

The case was tried to a jury for four days beginning April 17, 2006. The hearing to consider the foundation for Dr. France's testimony was held on April 19, 2006. Dr. France testified to lay a foundation for his opinions regarding impact speeds and forces generated in the collision. R. 774 at 112-166. He described the methodology used to reach his conclusions. R. 774 at 113-135. He examined the repair estimates for the Durango and the LeBaron, and color photographs of damage to the LeBaron. Based thereon, and using

barrier crash data, Dr. France opined the Durango was traveling at 9-12 miles per hour at the time of the collision. R. 774 at 128-133.

The court allowed the Prunedas to examine Dr. France on the issue of whether he was qualified to render such opinions. R. 774 at 136-164. Following the testimony of Dr. France, *Id.* at 113-165, the court ruled that there was sufficient foundation to allow Dr. France to testify. R. 774 at 165-66. Prunedas objected to all of the opinions rendered by Dr. France at the trial. R. 774 at 190. Specifically, the Prunedas objected that Dr. France could not establish that his methodology was reliable or had ever been shown by scientific testing to generate accurate results. Prunedas claimed he had insufficient information to reconstruct the collision even were the methodology reliable. R. 165; R. 774 at 136-164.

In his testimony at trial, Dr. France stated his methods were based upon accepted theories of conservation of energy. R. 774 at 121-22, 129-132. In other words, the impact speed (energy) of the Durango must equal the energy used up in damage to the LeBaron and the Nova, and the energy used to move the LeBaron and the Nova. R. 774 at 142-43. All of the energy must be accounted for. R. 774 at 141-43. However, Dr. France had no damage estimates or photographs depicting the damage to the Nova. *Id.*; R. 774 at 214. He admitted he could not accurately reconstruct the accident without the damage data on the Nova. *Id.* He knows energy was transferred to the Nova, but could not tell how much. *Id.* His calculations were made without any crush data on the Nova. R. 774 at 216-17. He admitted that he could not calculate the impact speed without the Delta V (impact energy). R. 774 at 222. Therefore, he simply rendered an educated guess. R. 774 at 222-23.

Dr. France admitted his analysis was simply an "educated guess" about the speed at impact. R. 774 at 145-47. He said, when using damage photographs and estimates to get the crush of the cars for use in reconstruction, all of the damage must be known. R. 774 at 147. But he didn't know all of the damage to the LeBaron or the Nova. R. 774 at 141-49. He admitted the less you know about the damage, the more you must estimate, resulting in greater error. R. 774 at 149-150.

Dr. France admitted his methodology to reconstruct this accident has never been tested and peer reviewed for accuracy[2]. R. 774 at 226-27. There have never been any studies that establish the error rate for his methodology. R. 774 at 161; 226-27, and it has never been shown to produce reliable conclusions as to actual impact speeds or the forces generated in an accident. *Id.*

Exhibit 13 was the only published article produced at trial that had any application to Dr. France's methodology. The testing described in Exhibit 13 showed such a wide range of speed estimates using pictures of damage to estimate speed, that it was obvious that this method was unreliable. R. 774 at 227-231, Exhibit 13 at 9-10. Dr. France's methodology has been created solely for litigation purposes and is only used by him for that purpose. R. 774 at 163.

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[2]While he admitted there have never been peer reviewed studies which demonstrate that accurate results can be obtained using his methodology, Dr. France did claim that Exhibit 11, which was produced during the foundational hearing, demonstrates that his methodology produces accurate results. R. 774 at 155:8-161. A careful review of Exhibit 11 fails to demonstrate such a claim.

Notwithstanding the failure of defendants' counsel to establish a recognized scientific basis for the opinions of Dr. France, or that his methodology had ever been tested and shown to produce accurate results, the trial court determined that there was sufficient foundation to allow Dr. France to testify. R. 774 at 165-66.

Plaintiffs also objected to the lack of foundation for Dr. Clarke's testimony. She said the Prunedas received too much chiropractic treatment and that there was no objective evidence to support the need for the care rendered by Dr. McClean. R. 775 at 26-65. But Dr. Clarke never examined Sergio or his children. R. 775 at 90. Notwithstanding, the trial court allowed Dr. Clarke to testify there was no documentation of any injuries to the children and too much chiropractic care. R. 775 at 47-52, 57, 60-65.

At the beginning of trial, defendants filed a Motion in Limine asking the court to preclude Dr. McClean from giving medical opinions on the cause of the Pruneda injuries he treated. R. 489-503. The basis for the motion was the claim that the Prunedas had not filed a Rule 26(a)(3)(B) report regarding Dr. McClean.

Dr. McClean was the treating doctor for the Prunedas. R. 773 at 63. He was not specifically hired as an expert as that term is used in Rule 26(a)(3)(B). On July 12, 2004, the Prunedas filed an expert designation with the court pursuant to the requirements of Rule 26(a)(3)(A), and stated that Dr. McClean would be offering opinions under Rule 702 at trial. R. 80. Although Dr. McClean was not specifically retained as an expert, the notice said he would give opinions about the treatment he rendered to the Prunedas. *Id.*

Dr. McClean had made specific notations in his records regarding the fact that the treatment he rendered was for injuries received in the July 31, 2002 collision. *E.g.* R. 773 at 96, 111, 127-28; R. 780-86. Defendants deposed Dr. McClean on September 21, 2004 with respect to his treatment and his medical records. R. 99. They had ample opportunity at that time to inquire about his opinions and the basis therefor.

The court granted the Motion in Limine, and said Dr. McClean could not express his opinion on the cause of injuries, because he didn't provide an expert report pursuant to Rule 26(a)(3)(B). R. 543-44. The court said it would allow admission of his medical records, but said Dr. McClean could not be asked any questions regarding causation of the injuries. R. 773 at 38-54.

At trial, Dr. McClean testified and read excerpts from his records without objection. Included were statements that Donovan, Anthony and Cozy reached maximum medical improvement for injuries received in the July 31, 2002 collision and were released from care. R. 773 at 96, 111, 127-28.

Subsequently, while testifying about his treatment of Matthew Pruneda, Dr. McClean was asked to read a similar entry from his medical records. R. 773 at 133. The defendants objected, and the court sustained the objection. *Id.* The ruling was based upon the court's *in limine* ruling that Dr. McClean was not allowed to testify about the cause of the injuries he had treated. R. 733 at 133-145.

The court then struck Dr. McClean's prior testimony respecting his release of Donovan, Anthony and Cozy from care for injuries received in the collision, even though

the testimony was given without objection. R. 773 at 96, 111, 127-28. The jury was told to disregard all prior testimony of Dr. McClean regarding causation.[3] R. 773 at 140-41. In addition, the court ruled that all references to causation of the injuries must be redacted from the medical records of Dr. McClean. R. 773 at 144-48. Thus, the medical records submitted to the jury had all of the references to the reason for treatment redacted.[4] R. 781 at 21; 782 at 20; 784 at 19; 785 at 15.

At the close of testimony, the matter was submitted to the jury on special interrogatories. In answering the interrogatories, the jury found that Gray was negligent, and that his negligence was a proximate cause of injury to Sergio and his children. The jury then found that the special damages suffered by Sergio and his children were: Sergio, $4,762.07; Anthony, $220.00; Donovan, $220.00; Sergio, Jr., $220.00; Cozy, $220.00; Matthew, $220.00; and Zennia, $220.00. Sergio was awarded no general damages. R. 703.

The Prunedas objected to the finding of no general damages and asked the trial court to send the jury out again with instructions that general damages must be awarded to Sergio. R. 570-72; 775 at 284-290. The court refused and dismissed the jury. The Prunedas objected. R. 570-72; 775 at 284-290.

On May 30, 2006, judgment was entered on the jury verdict. R. 770. Notice of Appeal was filed on June 23, 2006. R. 772.

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[3]The instruction given by the court is set forth at R. 773 at 140:24-141:6.

[4]Appendix Exhibit 5 contains the original pages which were redacted by the court.

B. Statement of Facts

1. On July 31, 2002, the parties were in a three car accident. R. 774 at 8, 12-13.

2. Gray's car rear ended Sergio Pruneda's car. R. 274 at 12.

3. Sergio Pruneda and his six children were in the car. R. 274 at 9-10.

4. The force of the collision pushed the Pruneda car forward into a Chevrolet Nova driven by Mr. Perez. R. 274 at 12-13.

5. The collision pushed the Perez car across the intersection. R. 775 at 13.

6. Sergio and his six children were all injured. R. 274 at 63-64, Exhibits 1-7.

7. On August 2, 2002, Sergio and his children went to the Total Health Institute in Lindon, Utah where they received chiropractic treatment until August 12, 2002. R. 274 at 25, Exhibits 1-7.

8. Total Health Institute billed $220.00 each for the care provided to the Pruneda children. Exhibits 1-7.

9. Sergio and his children were dissatisfied with their treatment, and changed to the clinic of Dr. Gordon McClean in Provo, Utah. R. 773 at 26-27.

10. Dr. McClean first examined the Prunedas on August 14, 2002. *Id.*; Exhibits 1-7.

11. Dr. McClean determined, from objective symptoms, that Sergio and each of the children had injuries from the accident which required treatment. R. 773 at 66-67, 86-88, 101-02, 114-15, 124, 129-130, 152; Exhibits 1-7.

12. Dr. McClean treated Sergio for his injuries from August 14, 2002 until December 30, 2002. R. 773 at 64-81; Exhibit 1.

13. Dr. McClean treated Donovan and Anthony Guerrero, Sergio Pruneda, Jr., and Cozy Pruneda for their injuries from August 14, 2002 until May 12, 2003. R. 773 at 83-111, 114-120, 123-28; Exhibits 2-5.

14. Dr. McClean treated Matthew and Zennia Pruneda for their injuries from August 14, 2002 until December 9, 2002. R. 773 at 129-133, 151-57; Exhibits 6-7.

15. Dr. McClean testified that he charged the sum of $6,207.57 to treat Sergio Pruneda, and $7,107.39 to treat Anthony Guererro, and $7,411.43 to treat Donovan Guererro, and $6,252.86 to treat Sergio Pruneda, Jr., and $4,835.73 to treat Cozy Pruneda, and $2,115.82 to treat Matthew Pruneda, and $1,999.20 to treat Zennia Pruneda. R. 773 at 82, 100, 111, 120-21, 128, 150-51, 157-58; Ex.1-7.

16. Dr. McClean testified that the sums charged for treating the Prunedas were fair and reasonable for the medical services provided. *Id.*

17. Defendants hired Dr. France to testify at trial as an expert on the impact speed of the Gray car and the forces generated in the collision. R. 774 at 112-166.

18. Dr. France said the Gray car was going 9-12 miles per hour at the time of impact. R. 774 at 133.

19. Dr. France testified that based upon the range of impact speeds he had determined, the change in velocity of the Pruneda car generated in the collision was in the range of 6.5 to 9 g's. R. 774 at 134.

20. Prior to reaching his conclusions, Dr. France did not examine any of the cars involved in the collision. R. 774 at 141.

21. The information relied upon by Dr. France consisted of verbal representations of the amount of damage to the Nova, a copy of the repair estimates on the Gray and Pruneda cars, and some photographs of the damage to the Gray and Pruneda cars, and crash test data from barrier collisions. R. 774 at 128-29.

22. Dr. France admitted he had no crash barrier test data for the Nova, and had no reliable information on the amount of damage done to the Nova from which calculations could be made. R. 774 at 125, 139-140.

23. Dr. France admitted on cross-examination there was frame damage to the LeBaron which did not show in the photographs, and that some of the LeBaron damage was not accounted for in the repair estimate. R. 774 at 139, 148-49.

24. Dr. France also admitted he had no repair estimates or photographs of the Perez car. R. 774 at 125, 139-140.

25. In reaching his conclusions, Dr. France relied upon crash test data involving cars that hit a barrier, a test performed under different circumstances, and which produces different damage than the damage produced when two cars collide. R. 774 at 122-23, 150, 209-210, 221-25.

26. Dr. France admitted he never visited the scene of the collision and had not measured the distance across the intersection or the grade of the road at the collision site. R. 774 at 217-220.

27. Dr. France said he relied on the estimate of Mr. Perez that his car traveled about 30 feet after impact. *Id.*

28. Dr. France admitted that to do his calculation, he must account for all of the energy dissipated in the collision. R. 774 at 141:11-15.

29. He also admitted he would need to know how much energy was absorbed by the Nova to obtain an accurate calculation. R. 774 at 141:16-142:2.

30. Although he lacked information on the actual damage done to the Nova, he determined the damage by "thresholding." R. 774 at 142:3-10.

31. Dr. France admitted he made an educated guess about the impact speed, because he lacked the data necessary to use momentum equations. R. 774 at 142-47, 220-26.

32. Dr. Jayne Clarke was hired as defendants medical expert and conducted only a medical records examination. R. 775 at 34-36.

33. She never saw or examined any of the plaintiffs. *Id.*

34. Over objection, the court allowed Dr. Clarke to testify that based upon Dr. France's findings, the forces in the collision were not sufficient to hurt someone. R. 775 at 36-37.

35. Over objection, Dr. Jayne Clarke was allowed to testify that Sergio was unable to provide a reasonable history to Dr. McClean. R. 775 at 46-48.

36. Over objection, the court allowed Dr. Clarke to characterize and criticize the behavior of the Prunedas based solely upon her dissatisfaction with how Dr. McClean kept his medical records. R. 775 at 46-52.

37. Over Prunedas' motion to the contrary, the court allowed Dr. Clarke to criticize the chiropractic care rendered by Dr. McClean. R. 775 at 51-62.

38. Dr. Clarke testified over objection, that in her opinion, Dr. McClean's treatment was unreasonable and exceeded that allowed by the CAD Protocols. R. 775 at 62-65.

39. She testified she is not a Chiropractor and that Chiropractors are trained and practice under different theories than her medical specialty. R. 775 at 70-74.

40. Dr. Clarke claimed she was very well versed on the CAD Protocols. R. 775 at 68:24-69:4.

41. However, the only familiarity Dr. Clarke had with the CAD Protocols was what she gained from a summary, source was unknown, which she obtained and reviewed between the date of her deposition and the date of trial. R. 775 at 81-84.

42. At the close of the evidence the case was submitted to the jury.

43. The jury found that Gray was negligent and that his negligence was a proximate cause of injury to the Prunedas. R. 703.

44. The jury awarded $4,762.07 to Sergio Pruneda for special damages and $220.00 to each of the children for special damages. *Id.*

45. The jury awarded no general damages. *Id.*

46. Plaintiffs told the court that the jury could not legally fail to award general damages to Sergio Pruneda, and asked the court to give an additional instruction to the jury. R. 704; R. 775 at 284-290.

47. The Prunedas asked the court to send the jury out again to deliberate on general damages. *Id.*

48. The court refused and dismissed the jury over the objection of the Prunedas. R. 775 at 284-290.

49. Judgment on the jury verdict was entered on May 30, 2006. R. 770.

50. Notice of Appeal was filed June 23, 2006. R. 772.

VIII

SUMMARY OF THE ARGUMENTS

POINT I

THE TRIAL COURT ERRED BY REFUSING TO SEND THE JURY FOR FURTHER DELIBERATIONS WITH AN INSTRUCTION THAT GENERAL DAMAGES MUST BE AWARDED.

The jury found that Sergio Pruneda was injured in the July 31, 2002 collision and awarded him $4,762.07 in special damages. They awarded no general damages. R. 703. Counsel objected, and asked the court to send the jury out with an instruction that general damages must be awarded in a reasonable amount, and that nominal damages were not appropriate. R. 775 at 284-290. Plaintiffs also tendered a proposed instruction. R. 704. The court refused to give the instruction, and the jury was discharged over plaintiffs objection. R. 775 at 284-290.

When a jury awards special damages, a plaintiff is also entitled to an award of general damages. *Langton v. International Transport, Inc.,* 491 P.2d 1211 (Utah 1971); *Cohn v. J. C. Penney Co., Inc.,* 26 Utah 2d 452, 491 P.2d 1211 (1971).

The trial court erred by overruling plaintiffs' objection to the failure to award general damages. In addition, the court erred by releasing the jury over plaintiffs' objection that they must award general damages. These errors were substantial and prejudicial and constitute reversible error. *Tingey v. Christensen*, 987 P.2d 588 (Utah 1999).

POINT II

AN AWARD OF SPECIAL DAMAGES EXCEEDING $3,000.00 ENTITLES A PLAINTIFF TO A SUBSTANTIAL GENERAL DAMAGES AWARD.

An award of special damages, in excess of Utah's statutory threshold of $3,000.00, should entitle a party to general damages in an amount which is substantial. Nominal damages are inappropriate in such a case. *See, e.g., Kepley v. Kim,* 843 P.2d 133 (Colo. App. 1992); *Shewry v. Heuer,* 121 N.W. 2d 529 (Iowa 1963). Nominal damages are appropriate only when a plaintiff fails to prove any damages. *Foote v. Clark,* 962 P.2d 52 (Utah 1998). Otherwise, the jury's failure to award general damages is "irreconcilably inconsistent and shows that the jury has disregarded proven elements of damage." *Kumorek v. Moyers,* 561 N.E. 2d 212, (Ill. App. 1990).

By exceeding the $3,000.00 statutory threshold, Sergio Pruneda suffered substantial special damages that should entitle him to more than nominal general damages. *See* Utah Code Ann. § 31A-22-309(1)(a)(v) (Supp. 2001).

POINT III

THE COURT ERRED BY REFUSING TO ALLOW THE TREATING PHYSICIAN TO TESTIFY ABOUT THE CAUSE OF PLAINTIFFS' INJURIES.

The bulk of the medical treatment the injuries the Prunedas received in the collision was provided by Dr. Gordon McClean. R. 780-86. Plaintiffs filed a designation under Rule 26(a)(3)(A) which identified Dr. McClean as a doctor who would provide opinion evidence under Rule 702 of the Rules of Evidence. R. 79-80.

Defendants asked the court to exclude testimony by Dr. McClean about the cause of the injuries he treated because no expert witness report was filed pursuant to Rule 26(a)(3)(B). R. 497-98. The court granted the motion. R. 773 at 38-55.

The court limited Dr. McClean's trial testimony to his medical records and his treatment of the plaintiffs. Dr. McClean's records said he treated injuries that were received in the July 31, 2002 automobile accident. R. 773 at 96, 111, 127-28. Dr. McClean, without objection, read from his medical records for Donovan, Anthony and Cozy, that each of these children reached maximum medical improvement for injuries related to the July 31, 2002 collision on the date of their release from his care. *Id.* Following this testimony, Dr. McClean was asked to give his medical assessment of Matthew. Again, he read from his medical records. He said Matthew was released upon

reaching maximum medical improvement for injuries related to the July 31, 2002 collision. R. 773 at 133.

Defendants objected to this testimony arguing it was a violation of the court's ruling on the Motion in Limine. R. 773 at 133-136. The court sustained the objection.

In addition, the court instructed the jury to disregard all previous testimony of Dr. McClean on causation. R. 773 at 140-41. That instruction, and the failure of the court to allow the treating physician to testify from his medical records, caused the jury to disallow payment for all treatment rendered to the children by Dr. McClean. The jury awarded the children only $220.00 each in special damages, for treatment received at Total Health Institute. Exhibits 1-7.

The Prunedas claim that the trial court erred as a matter of law in its interpretation of the requirements of Rule 26(a)(3). Rule 26(a)(3)(A) requires identification of witnesses who will render opinions under Rule 702. It does not require a specific expert report by a treating physician. *Pete v. Youngblood*, 141 P.3d 629 (Utah App. 2006).

The plaintiffs were unfairly prejudiced when the court refused to let the treating physician read from his records, and then struck prior testimony which was received without objection. Plaintiffs are entitled to a new trial on the issue of damages. *Id.*

The exclusion of the treating physician's opinions, coupled with the so-called curative instruction to disregard previously given testimony, denied the Prunedas a fair opportunity to establish the amount of special damages resulting from the July 31, 2002 collision. The jury did not award special damages to any of the Pruneda children for

treatment by Dr. McClean. The refusal to award damages for Dr. McClean's treatment of the children was a direct result of the court's curative instruction and the ruling that Dr. McClean could not opine about the cause of the injuries he was treating.

Such error was prejudicial and entitles the Prunedas to a new trial on the issue of damages. *Tingey v. Christensen, supra.*

POINT IV

THE EXPERT TESTIMONY OF PAUL FRANCE WAS NOT ADMISSIBLE UNDER RULE 702 OF THE UTAH RULES OF EVIDENCE.

Defendants offered the testimony of Dr. Paul France as an expert on accident reconstruction. Plaintiffs asked the court to exclude the proposed testimony as lacking a proper foundation. R. 163-65; 774 at 112-13, 165-66, 190. The methodology used by Dr. France to determine the impact speed was unreliable, and had never been shown by any type of scientific testing to produce accurate results. Dr. France had admitted his conclusions were simply "educated guesses." *See* R. 774 at 142-47, 222-23.

The court denied plaintiffs' motion. R. 463, 465.

A hearing on the foundation for Dr. France's testimony was held at trial. R. 774 at 113-166. The court ruled that Dr. France could testify about the impact speed of the defendant's Durango hitting the rear of the Pruneda LeBaron. R. 774 at 165-66.

When an expert opinion is offered under Rule 702, the trial judge has a duty to ensure that the offered opinion is reliable. *See Phillips v. Jackson*, 615 P.2d 1128 (Utah 1980); *State v. Rimmasch,* 775 P.2d 388 (Utah 1989); *Alder v. Bayer Corp.*, 61 P.3d 1068

(Utah 2002); *State v. Crosby,* 927 P.2d 638 (Utah 1996); *Haupt v. Heaps*, 131 P.3d 252 (Utah App. 2005). Inherent reliability rather than general acceptance is the touchstone of admissibility. *Id.* The trial court has a responsibility to exclude so-called "junk science," or "science" which has no accepted scientific basis. *Id.*

The admissibility of expert evidence obtained using the same methodology employed by Dr. France was considered by the Virginia Supreme Court in *Tittsworth v. Robinson*, 252 Va. 151, 475 S.E.2d 261 (1996). The court said such testimony was unreliable as a matter of law. 475 S.E. 2d at 262-63. Like this case, the expert in *Tittsworth* never saw the cars involved in the crash. Like Dr. France, he did not have all of the damage information necessary to reconstruct the accident, and the Virginia court found that he must have used estimates to reach his conclusions.

Dr. France admitted that he could not reconstruct an accident without repair estimates and photographs of the damage to all of the involved cars. *Id.* at 140:22-141:2. But then, he proceeded to reconstruct this accident (involving three cars) with no photographs or repair estimates for the Nova, and no knowledge of the total amount of damage to the LeBaron.

His methodology was a combination of crush analysis and momentum equations. R. 774 at 119:13-17. He admitted that if he used the damage to the cars to determine the crush involved in the collision, he must know all of the damage that occurred. *Id.* at 144:8-13. Yet he admitted he did not know all of the damage in this collision. *Id.* at 139-142. He admitted there was damage to the Pruneda car that was not in the repair estimates.

R. 774 at 147:14-148:8. There was frame damage to the Pruneda vehicle of an unknown magnitude. *Id.* at 148:9-149:18. He did not even consider the significant damage to the rear of the Pruneda car a major part of his analysis. *Id.* at 137.

Dr. France said his lack of information simply created a greater need to "estimate." *Id.* at 149-150. He admitted the more things you don't know, the more guesses you have to make. The more guesses you make, the greater the error. *Id.* at 223. All things considered, the so called expert opinion of Dr. France as to the impact speed in this collision is simply a mountain of guesswork. *Id.* at 145-47, 149-150, 222-23.

While Dr. France may have a belief that his "estimates" are accurate and reliable, he admitted that there are no peer reviewed studies that show this methodology can produce an accurate replicable result. R. 774 at 226:12-19. There are no published studies of any kind that show his methodology produces accurate results. *Id.* at 226:20-227:1. There have been no studies of this methodology that show the margin of error in the estimated impact speeds. *Id.* at 227:2-8. By his own admission, he could only give an educated guess about the impact speed. *Id.* at 145:4-147:7.

An educated guess does not provide an adequate foundation for expert testimony. *State v. Jarrell*, 608 P.2d 218 (Utah 1980)(expert may not give an opinion which represents a mere guess). Without evidence of the reliability of testing, the results of such tests are inadmissable. *Kofford v. Flora,* 744 P.2d 1343, 1346-47 (Utah 1987).

POINT V

THE EXPERT TESTIMONY OF JAYNE CLARKE WAS NOT ADMISSIBLE UNDER RULE 702 OF THE UTAH RULES OF EVIDENCE.

Defendants hired Dr. Jayne Clarke to review medical records and provide expert testimony at trial. Dr. Clarke, an M.D., reviewed medical records and documents provided by defendants and issued a report. R. 775 at 34-36. She never examined any of the plaintiffs. R. 775 at 90, 107:19-22.

The Prunedas asked the court to exclude testimony of Dr. Clarke criticizing the treatment provided by Dr. McClean. R. 114-15. The motion was denied by the court. R. 116-162, 349-439; R. 463-65.

At trial, Dr. Clarke testified, over objection, that the Prunedas received too much chiropractic care; that there was minimal force involved in the collision; and that Dr. McClean's records were inadequate to support the treatment he had rendered. R. 775 at 36-37, 47-65.

Our Supreme Court has long held that practitioners in one specialty are not ordinarily competent to testify as experts on the standard of care applicable to practitioners in another specialty. *Arnold v. Curtis*, 846 P.2d 1307, 1310 (Utah 1993); *Astill v. Clark*, 956 P.2d 1081 (Utah 1998); *Chadwick v. Nielsen*, 763 P.2d 817 (Utah 1988); *Dikeou v. Osborn*, 881 P.2d 943 (Utah App. 1994); *Kent v. Pioneer Valley Hospital*, 930 P.2d 904 (Utah App. 1997). Testimony of medical experts is specific to their particular specialty. *Id.* A physician is not qualified to give an admissible opinion on the treatment provided by

another physician unless the physician giving the opinion is shown to have familiarity with the treating physician's particular area of practice. *Butterfield v. Okubo*, 790 P.2d 94 (Utah 1990); *Burton v. Youngblood*, 711 P.2d 245 (Utah 1985); *Dikeou v. Osborn, supra*; *Kent v. Pioneer Valley Hospital, supra.*

Dr. Clarke admitted she has little or no training in chiropractic medicine. She is not a licensed chiropractor. R. 775 at 70-73. She admitted in her deposition to having little, if any, familiarity with the CAD treatment protocols adopted by the Utah Chiropractic Association. Then at trial, she claimed to have expertise on these treatment protocols. R. 775 at 56-58, 82-83. She was allowed to testify extensively that the treatment rendered by Dr. McClean under the CAD Protocols was not appropriate. R. 775 at 58-65.

The rationale for prohibiting an M.D. from scrutinizing an M.D. in a different specialty is even more compelling when an M.D. scrutinizes the care rendered by a chiropractor. Dr. Clarke does not practice the chiropractic method. She said chiropractic medicine uses a different theory of healing, that chiropractors treat differently than an M.D., and that the number of appropriate treatments is not standardized. R. 775 at 70-74.

The admission of Dr. Clarke's testimony is governed by URE Rule 702. Dr. Clarke must show she has the background and training in chiropractic medicine that would allow her to opine on the type and amount of chiropractic care rendered by Dr. McClean in this case. *Arnold v. Curtis, supra; Astill v. Clark, supra; Chadwick v. Nielsen, supra; Butterfield v. Okubo, supra; Burton v. Youngblood, supra; Martin v. Mott,* 744 P.2d 337 (Utah 1987). She did not. R. 775 at 69-74, 81-92. She failed to do so.

There was a total lack of any foundation for Dr. Clarke's opinions. She never saw or examined any of the Prunedas. Her testimony was based solely upon a review of medical records and other written materials provided by the defense. The court abused its discretion when it allowed her to give testimony regarding the chiropractic standard of care. *Id. See State v. Pena, supra.*

IX

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY REFUSING TO SEND THE JURY FOR FURTHER DELIBERATIONS WITH AN INSTRUCTION THAT GENERAL DAMAGES MUST BE AWARDED.

The jury awarded Sergio Pruneda $4,762.07 in special damages and no general damages. Plaintiffs asked the Court to instruct the jury to award general damages in a reasonable amount. Plaintiffs also tendered a proposed instruction. R. 704. The jury was discharged over plaintiffs objection. R. 775 at 284:8-290:9.

Whether or not the court should have given the post-judgment instruction is a question of law which is reviewed for correctness. *Cornia v. Wilcox,* 898 P.2d 1379, 1386 (Utah 1995); *Langton v. International Transport, Inc., supra*; *Cohn v. J. C. Penney Co., Inc., supra.*

If a jury awards special damages, general damages must be awarded. *Langton v. International Transport, Inc., supra.* When a jury awards special damages, but no general

damages, the court must instruct them on their error and allow them to deliberate further on an award of general damages. *Id.*

The trial court erred by overruling plaintiffs' objection to the failure to award general damages. In addition, the court erred by releasing the jury over plaintiffs' objection that they must award general damages. These errors were substantial and prejudicial because Sergio was denied his right to recover general damages.

POINT II

AN AWARD OF SPECIAL DAMAGES EXCEEDING $3,000.00 ENTITLES A PLAINTIFF TO A SUBSTANTIAL GENERAL DAMAGES AWARD.

An award of special damages, in excess of Utah's statutory threshold of $3,000.00, should entitle a party to a substantial award of general damages. Nominal damages cannot be awarded by a jury in such a case. *See, e.g., Kepley v. Kim,* 843 P.2d 133 (Colo. App. 1992) (award of $0.00 in non-economic damages could not stand in the face of a special damage award of $3,000.00 incurred for treatment and alleviation of pain); *Shewry v. Heuer,* 121 N.W. 2d 529 (Iowa 1963) (abuse of discretion to not grant a new trial where jury awarded costs of medical expenses for treatment of pain and suffering yet nothing for general damages).

By awarding $4,762.07 for medical treatment, the jury found that Sergio Pruneda suffered sufficiently serious pain and injury to warrant at least $3,000.00 in medical treatment for injuries resulting from the accident.

Nominal damages are appropriate only when a plaintiff fails to prove any damages. *Foote v. Clark, supra.* Therefore, when $4,762.07 is awarded for special damages, the jury's failure to award general damages is irreconcilably inconsistent and shows that the jury has disregarded proven elements of damage. *See, Kumorek v. Moyers, supra.*

The amount of special damages necessary to allow a plaintiff to recover damages for pain and suffering has been statutorily determined to be $3,000.00. Utah's no-fault threshold statute, Utah Code Ann. § 31A-22-309, prohibits a general damage award in smaller tort claims arising out of car accidents. However, even in those cases, special damages may be justified when a legal right has been invaded. *See,* Utah Code Ann. § 31A-22-309 (1)(a); *Warren v. Melville*, 937 P.2d 556, 563 (Utah App. 1997). By exceeding the $3,000.00 statutory threshold, Sergio Pruneda suffered substantial medical damages that should entitle him to more than nominal general damages for pain and suffering. *See* Utah Code Ann. § 31A-22-309(1)(a)(v) (Supp. 2001).

This issue appears to be one of first impression in Utah. However, in *Langton v. International Transport, Inc., supra,* the Utah Supreme Court, in dictum, said: "[I]t must be conceded that if plaintiff were entitled to an award of special damages, he was entitled to be compensated, under the evidence, for pain and suffering . . . " *Id.* at 1214. Indeed, such is the rule in many other jurisdictions. *See, e.g., Kepley v. Kim, supra; Shewry v. Heuer, supra.*

The concept that meeting a statutory threshold must entitle one to recover general damages suggests that more than nominal general damages must be awarded where the

statutory threshold has been met. Reaching the threshold *ipso facto* shows a serious injury. It would be inconsistent with the statutory scheme to disallow general damages or to allow only a nominal amount when the statutory threshold which defines "serious injury" is met. For this reason, the trial court should have given the proposed instruction, R. 704, and sent the jury out to deliberate further on a general damages award. Sergio Pruneda was denied a fair trial on the issue of general damages. The verdict should be reversed and the case remanded for a new trial on damages. Upon remand, this court should instruct the trial court that nominal damages are not appropriate in this case.

POINT III

THE COURT ERRED BY REFUSING TO ALLOW THE TREATING PHYSICIAN TO TESTIFY ABOUT THE CAUSE OF PLAINTIFFS' INJURIES.

The bulk of the medical treatment for treatment of the injuries the Prunedas received in the collision was provided by Dr. Gordon McClean. R. 780-86. Plaintiffs filed a designation under Rule 26(a)(3)(A) identifying Dr. McClean as one who would provide opinion evidence at trial under Rule 702 of the Rules of Evidence. R. 79-80.

On the opening day of trial, defendants filed a Motion in Limine asking the trial court to exclude any testimony of plaintiffs' treating doctor, Dr. McClean, on the issue of causation of plaintiffs' injuries. R. 497-98. The gist of the motion was that plaintiffs did not identify Dr. McClean as an expert witness, and failed to file the expert witness report required by Rule 26(a)(3)(B). R. 499-502.

The motion was filed the morning of trial and argued to the court. R. 773 at 38-55. Plaintiffs claimed that their expert designation, R. 79-80, clearly informed defendants that Dr. McClean would be offering testimony at trial under Rule 702. In addition, because Dr. McClean would offer such opinions at trial under Rule 702, defendants had an opportunity and an obligation to inquire about such issues when they took his deposition on September 21, 2004, and to review his records for opinions contained therein R. 773 at 40-49.

Defendants argued to the court that they were prejudiced because they never received a Rule 26(a)(3)(B) expert report. R. 499-502, 773 at 49-52. Plaintiffs claimed that no such report was required because Dr. McClean was not a "retained expert" as that term is used in Rule 26(a)(3)(B). Plaintiff directed the court to the advisory committee's notes to the 1993 amendments to the Federal Rules of Civil Procedure. R. 773 at 42-47. *See,* Appendix Exhibit 6.

The court granted the motion and ruled that Dr. McClean would be precluded from giving any testimony at trial about the causation of the plaintiffs' injuries. R. 773 at 38-55. The court limited his testimony to treatment of the plaintiffs, and the materials contained in his medical records[5]. *See,* R. 773 at 54-55.

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[5]The court made rulings at trial which precluded Dr. McClean from testifying regarding specific entries in the medical records which refer to the treatments of the children as being for injuries received in the automobile collision. (R. 773 at 53-55) The court required the medical records be redacted to remove such entries. (R. 773 at 144-46) The entries were redacted from the medical records admitted at trial. R. 780-786. Unredacted copies were introduced by Defendants as exhibits to the deposition of Dr. McClean taken on September 21, 2004. Copies of the pertinent unredacted records are contained in Exhibit 5 of the Appendix.

Dr. McClean's records made specific reference to his treatment of injuries received by plaintiffs in the July 31, 2002 automobile accident. Without objection, he read from his medical records for Donovan, Anthony and Cozy. He said each of these children reached maximum medical improvement for injuries related to the July 31, 2002 collision on the date of their release from his care. R. 773 at 96, 111, 127-28. Following this testimony, Dr. McClean was asked about his treatment of Matthew Pruneda. He was asked to give his medical assessment of Matthew upon release from treatment. Again, he read from his medical records that Matthew reached maximum medical improvement for injuries related to the July 31, 2002 collision. R. 773 at 132-33.

Only then did defendants object to this testimony. R. 773 at 133:3-8. This objection was to the same question that was asked and answered without objection during testimony regarding Donovan, Anthony and Cozy. R. 773 at 96, 111, 127-28. Defendants objected to the testimony arguing it was a violation of the court's ruling on the Motion in Limine. R. 773 at 133-36.

Plaintiffs argued that the statements were from medical records of Dr. McClean. R. 773 at 136-140. These were records that defense counsel had since early 2004, and which were used as exhibits in the McClean deposition on September 21, 2004. Plaintiffs argued the court had never ruled that Dr. McClean could not testify about the content of his medical records, and that the failure to previously object was a waiver of any objection to his giving similar testimony from his records. R. 773 at 54-55, 144-47.

The court sustained the objection. In addition, the court instructed the jury to disregard all previous testimony of Dr. McClean on causation. R. 773 at 140-141.

The instruction proposed by defendants and given by the court stated:

> Members of the jury, I instruct you that any testimony by Dr. McClean that his diagnosis was related or caused by the MVA – motor vehicle accident – excuse me, motor vehicle accident of July 31, 02 is stricken and you should disregard that testimony and not consider it.
> R. 773 at 140:24-141:6.

Plaintiffs believe that this instruction and the failure of the court to allow the treating physician to testify from his medical records caused the jury to disallow payment for all treatment rendered to the Pruneda children by Dr. McClean. The jury awarded the children only $220.00 each in special damages. That is the exact amount each child paid for treatment at Total Health Institute, prior to their treatment by Dr. McClean.

The rulings by the trial court unfairly prejudiced plaintiffs and require granting of a new trial. *Pete v. Youngblood, supra; Tingey v. Christensen, supra.* Testimony by a treating doctor was disallowed. Moreover, the jury was told to disregard the prior testimony from his records that he treated the children for injuries received in the collision. The court effectively told the jury there was no evidence to connect Dr. McClean's treatment to the collision.

The court erred in its interpretation of Rule 26(a)(3). There is no issue that plaintiffs' expert designation, R. 79-80, complied with the requirements of Rule 26(a)(3)(A). The plain language of Rule 26(a)(3)(B) only requires a written report for a witness who is retained or specially employed to provide expert testimony in the case or

whose duties as a party's employee regularly involve the giving of expert testimony. A treating physician does not meet this definition.

After entry of the Judgment in this case, the Utah Court of Appeals issued its opinion in the case of *Pete v. Youngblood, supra.* The Court said:

> Rule 26(a)(3) relates to the disclosure of expert testimony and creates two distinct requirements: (1) disclosure of the identity of experts and (2) provision of an expert report.
>
> . . . .
>
> Nothing in rule 26(a)(3)(A) limits the obligation to identify persons who may be used to give expert opinions. In contrast, rule 26(a)(3)(B) states:
>
> > Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party.
>
> Utah R. Civ. P. 26(a)(3)(B). Thus, rule 26(a)(3) contemplates that all persons who may provide opinion testimony based on experience or training will be identified, but that only retained or specially employed experts are required to also provide an expert report. Indeed, the rule itself recognizes that only some of the experts that must be identified will also be required to file a report. 141 P.3d at 633 (emphasis added).

Citing federal court authority, Utah's Court held that the requirement of Rule 26(a)(3)(B) that a report be given does not address itself to the expert whose information was not acquired in preparation for trial. Rather, because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit (a treating doctor) such an expert should be treated as an ordinary witness. *Id.* at 634.

Defendants had the opportunity to depose Dr. McClean as to the treatment he rendered to the Pruneda family, as well as the statements in his medical records that the treatment was for injuries received in the collision.

Normally, a decision of a trial court to admit or exclude expert testimony is reviewed on an abuse of discretion standard. *E.g. Dikeou v. Osborn, supra.* However, courts recognize that a ruling on evidence is often the sum of other rulings which are reviewable under separate standards of review. *See State v. Jacques,* 924 P.2d 898, 900 (Utah App. 1996). Because the trial court's rulings regarding the admissibility of the proposed testimony of Dr. McClean were made based *in toto* upon the trial court's erroneous interpretation of the requirements of Rule 26(a)(3), this court should review the ruling for correctness. *State v. Pena,* 869 P.2d 932, 935 (Utah 1994); *Jeffs v. Stubbs,* 970 P.2d 1234, 1243 (Utah 1998) *cert. denied* 119 S. Ct. 1803 (1999).

The person asserting error has the burden to show not only that the error occurred but also that it was substantial and prejudicial. *Stevenett v. Wal-Mart Stores, Inc.,* 997 P.2d 508, 511 (Utah App. 1999); *Tingey v. Christensen, supra.* The exclusion of the treating physician's opinions, coupled with the so-called curative instruction to disregard previously given testimony, denied the Prunedas a fair opportunity to establish the amount of special damages resulting from the July 31, 2002 collision. Plaintiffs were not given a meaningful opportunity to present evidence of Dr. McClean's charges. The jury did not award special damages to any of the Pruneda children for treatment by Dr. McClean. The refusal to award damages for Dr. McClean's treatment of the children was a direct result of the court's curative instruction coupled with the ruling that Dr. McClean could not opine about the cause of the injuries he was treating.

Such error is *ipso facto* prejudicial. It entitles the Prunedas to a new trial on the issue of damages. This case should be remanded to the trial court with instructions to schedule a new trial for the Prunedas on the issue of damages, and to allow Dr. McClean to render his opinions regarding causation of the injuries.

POINT IV

THE EXPERT TESTIMONY OF PAUL FRANCE WAS NOT ADMISSIBLE UNDER RULE 702 OF THE UTAH RULES OF EVIDENCE.

A. Background

Defendants offered the testimony of Dr. Paul France as an expert on accident reconstruction. Plaintiffs asked the court to exclude the proposed testimony as lacking a proper foundation. R. 163-65; 774 at 112-13, 165-66, 190. The methodology used by Dr. France to determine the impact speed was unreliable, and had never been shown by any type of scientific testing to produce accurate results. Dr. France admitted his conclusions were simply "educated guesses." *See* R. 774 at 142-47, 222-23.

The court denied plaintiffs' motion. R. 463, 465. In its ruling, the court stated that it would hold a hearing at trial on the foundation for his expert testimony. *Id.*

A hearing on the foundation for Dr. France's testimony was held on April 19, 2006. R. 774 at 113-166. The court ruled that Dr. France could testify that the impact speed of the defendant's Durango hitting the rear of the Pruneda LeBaron was in the range of 9-12 miles per hour. R. 774 at 128-133, 165-66.

B. Legal Standard.

When an expert opinion is offered under Rule 702, the trial judge has a duty to ensure that the offered opinion is reliable. *See Phillips v. Jackson, supra*; *State v. Rimmasch, supra; Alder v. Bayer Corp., supra; State v. Crosby, supra*; *Haupt v. Heaps, supra.*. Inherent reliability rather than general acceptance is the touchstone of admissibility. *Id.* The trial court has a responsibility to exclude so called "junk science," or "science" which has no accepted scientific basis. *Id.*

In *Kofford v. Flora, supra,* our Supreme Court held that without evidence of the reliability of testing, the results of such tests are inadmissable. *Id.* at 1346-47. The *Kofford* Court held that if the techniques used in the testing are not shown to be accepted as reliable, the court must find the test to be unreliable. *Id.* at 1347. Since Dr. France admitted there have never been any tests which establish the reliability of his methods, the methods he used must be found to be unreliable as a matter of law. *Id.; Tittsworth v. Robinson, supra*. In addition his lack of necessary information about the cars makes his conclusions inadmissible. *Kofford v. Flora, supra*.

Legitimate science consists of methodologies that have been shown by scientific testing to produce consistent and reliable results. Accepted scientific methodologies are subjected to testing to show that the methodology produces consistent and reliable results. Margins of error in the testing are measured and published. The testing is peer reviewed for accuracy and reliability. The methodology is reviewed to see if it consistently produces the same results, and to see if the results can be consistently replicated.

In its gatekeeper role, the trial court must ensure that any so-called "scientific evidence" is inherently reliable; that the scientific principles and techniques used by the expert, and found by the court to be reliable, have been properly applied to specific facts at issue in the case, and not to mere speculations or guesses; and that the "experts" are sufficiently qualified to correctly apply the techniques and principles. *Id. See, Phillips v. Jackson, supra*; *State v. Rimmasch, supra; State v. Crosby, supra.*

When a party challenges the methodology used to reach the conclusions to which the expert expects to opine, it is not sufficient for the expert to bootstrap his opinions by merely stating "all accident reconstructionists use this method." The expert should be required to produce some tangible evidence that the methodology has been peer reviewed, that it produces reliable results, and that it is a method that can produce accurate and replicable results with a measurable margin of error. *Phillips v. Jackson*, *supra* (inherent reliability rather than general acceptance is the touchstone of admissibility).

If "reliability" rather than claimed "general acceptance" is the touchstone of admissibility, then an expert should be required to demonstrate to the court that his methodology has been scientifically tested, and shown to produce reliable results. Dr. France was unable to identify a single study that showed his methodology had any degree of reliability. R. 774 at 226-27. He had nothing to corroborate his claim that the methodology is generally accepted or that it produces accurate and reliable results. *Id.*

The admissibility of expert evidence derived from the same methodology used by Dr. France was considered by the Virginia Supreme Court in *Tittsworth v. Robinson,*

supra. The Court said such evidence was speculative, unreliable, and lacked foundation as a matter of law. 475 S.E.2d. at 262-63. The Court said:

> [W]e think the experts' testimony here fails to meet the fundamental requirements enumerated above. With respect to Cipriani, there was no showing that the crash tests relied upon were conducted under conditions similar to those existing at the accident scene. More importantly, Cipriani never examined the vehicles involved in the collision; rather, he relied solely upon the photographs of the vehicles to determine the permanent crush damage thereto. He did not know whether the undercarriages of the vehicles had been damaged, and, if so, the extent thereof. Indeed, Cipriani simply "assumed" that each vehicle sustained a crush damage of one-half an inch. 475 S.E. 2d at 263.

Like this case, the expert in *Tittsworth* never saw the cars involved in the crash. Like Dr. France, he did not have all of the damage information. The court decided the expert must have used estimates to reach his conclusions. Such evidence lacked a sufficient foundation and was speculative. The case was reversed and remanded for a new trial.

A defendant always has the burden to produce an adequate foundation for any proposed expert testimony. An adequate foundation requires not only that the methodology is reliable, but that the expert have sufficient information to apply the methodology. He cannot fill in the blanks with guesses. *State v. Mead,* 27 P.3d 1115 (Utah App. 2001).

An educated guess does not provide an adequate foundation for expert testimony. *State v. Jarrell, supra* (expert may not give an opinion which represents a mere guess). Without evidence of the reliability of testing, the results of such tests are inadmissable. *Kofford v. Flora, supra* at 1346-47.

Due to the speculation involved in Dr. France's determination of impact speed, his testimony was inherently unreliable and the court should not have allowed him to testify as to his opinions on the impact speed of the Gray car. *Id.*

This type of speculative testimony is not admissible. *State v. Rimmasch, supra; Brewer v. Denver & Rio Grande Western R.R.,* 31 P.3d 557 (Utah 2001); *See State v. Pendergrass*, 803 P.2d 261 (Utah app. 1990)(psychiatrist's testimony excluded because it relied upon too many unknown facts); *Ostler v. Aldina Transfer Co., Inc.*, 781 P.2d 445 (Utah app 1989)(expert opinion excluded because based, in part, on speculation as to facts).

C. There was no proper foundation for the testimony of Dr. France because his methodology was flawed and there was insufficient factual information to allow him to use the methodology.

In this case, not only was the methodology employed by Dr. France unreliable, but Dr. France admitted he did not have sufficient information to apply his methodology. Because he lacked the necessary information about all three cars he had to guess to reach his conclusions. Such guessing is not a proper foundation for an opinion. *State v. Jarrell, supra.*

1. The methodology employed by Dr. France has never been shown to be reliable.

Dr. France's methodology is unreliable as a matter of law, because no peer review study has shown it will produce accurate results. R. 774 at 226:12-19. There are no

published studies of any kind that show his methodology produces accurate results. *Id.* at 226:20-227:1. There have been no studies of this methodology that show the margin of error in the estimated impact speeds. *Id.* at 227:2-8. By his own admission, he could only give an educated guess about the impact speed. *Id.* at 145-47.

The methodology employed by Dr. France is exactly the type of "junk science" which the courts have stated must not be allowed in the courtroom. Because it depends on the "educated guesswork" of the person doing the testing, it cannot be replicated. There is no known margin of error. There is no way to test its accuracy. It is simply a method that was developed to allow a purported expert to guess at the impact speed under a veneer of respectability. The methodology is used by Dr. France only in litigation and has no other purpose. R. 774 at 163:7-16, 231.

Although Dr. France claimed his methodology is commonly used, and is published in SAE literature, he was unable to produce a single study showing testing and acceptance that his method has any degree of reliability. R. 774 at 226-27.

2. Dr. France had insufficient information to properly apply his methodology.

Even if the methodology was reliable, Dr. France lacked the information he claimed was needed for his calculations. He didn't have information about the damages to all of the cars involved in the collision. R. 774 at 139-144. He admitted that his "opinion" is merely an educated guess. R. 774 at 145-47, 222-23. He cannot be allowed to render his "guess" as an expert opinion. *State v. Jarrell, supra.*

Dr. France said his methodology was a combination of crush analysis and momentum equations. R. 774 at 119:13-17. He admitted that if he used the damage to the cars to determine the crush involved in the collision, he must know all of the damage that occurred. *Id.* at 144:8-13. Yet he admitted he did not know all of the damage. *Id.* at 139-142. He admitted there was damage to the Pruneda car that was not in the repair estimates. R. 774 at 147:14-148:8. There was frame damage to the Pruneda car of an unknown magnitude. *Id.* at 148:9-149:18. He did not even consider the significant damage to the rear of the Pruneda car a major part of his analysis. *Id.* at 137.

To accomplish his analysis, Dr. France typically looks at photographs, repair estimates or invoices, and testimony to determine the damage to the cars. He then uses his conclusions about the amount of damage to make his opinions. *Id.* at 118-19. Dr. France claimed, with no supporting evidence, that this type of analysis is commonly used by accident reconstructionists. Prunedas objected to this testimony. *Id.* at 119-120, 125. Dr. France claims that the scientific basis for his analysis relies upon the laws of momentum. *Id.* at 120-21.

Dr. France testified that physics calculations allow one to determine the Delta V if the impact speed is known, or vice-versa. If neither is known, the momentum calculation cannot be done. *Id.* at 144:10-22, 222:2-16.

In this case neither was known. Therefore, to get the gravity forces necessary to support Dr. Clarke's testimony, Dr. France made an educated guess, which he testified was the range of forces generated in the collision. R. 774 at 139-150, 222-23. Dr. France

admitted using his methodology to arrive at either the Delta V or impact speed so that he can do his calculations. R. 774 at 144:23-145:3. By his own admission, he could only give an "educated guess" about the impact speed. *Id.* at 145:4-147:7.

Dr. France claims he uses barrier test data to help extrapolate impact speeds in a three car collision. Yet he admits he did not use data with respect to the rear damage on the LeBaron. Moreover, he had no data for the Nova. R. 774 at 139-150.

The LeBaron had damage above the threshold in both front and rear. R. 774 at 137-140. Dr. France claimed he could support the low numbers because of the minimal damage to the front of the Durango. *Id.* at 142. He paid little, if any, attention to the major damage to the rear of the Pruneda car. R. 774 at 137:15-16. Dr. France admitted the Durango caused significant damage to the rear of the LeBaron as shown in Exhibits 9 and 10. He admitted that the force of the collision drove the LeBaron forward with enough force to strike the Nova and cause damage similar to the damage to the rear of the LeBaron. He admitted there was damage above the threshold to the front of the LeBaron. There was still enough energy to push the Nova across the intersection. Dr. France claimed all of this resulted from a blow to the rear of the LeBaron which he claimed occurred at under 12 miles per hour. *Id.* at 133, 137-142, 151-52.

Even if Dr. France could accurately determine the impact speed in a rear end collision solely from photographs, damage estimates, and barrier test data, he could not do so in this case. By his own admission, he did not have the information he said is necessary to determine the crush. *Id.* at 147:8-13. He had no reliable information regarding damage

to the Nova. *Id.* at 216-17. He had no estimates or photographs of the damage to the Nova. He did not even know the full extent of the damage to the LeBaron. *Id.* at 128-29, 142-43, 147-49. Dr. France readily admitted he did not have the information necessary to determine the amount of energy transferred between the cars in the crash. *Id.* at 143:16-25. Not having the information he claimed was necessary to do a reconstruction precluded him from making a reliable determination as to the impact speed. Dr. France claimed the laws of physics regarding conservation of momentum allow him to do his calculations. He testified it is a simple momentum equation. R. 774 at 118-121. The energy generated by the speed of the Durango at collision, must equal the energy expended to damage the Pruneda LeBaron, drive it into the Nova, damage the Nova, and drive the Nova across the intersection. *Id.* at 115, 118, 120-21.

Dr. France admitted at trial that he had never visited the scene of the accident and had no idea as to the size of the intersection, nor the angle of incline of the roadway at the point of impact. The inherent unreliability of Dr. France's opinions as to impact speed are even greater in this case than in *Tittsworth* because in this case three cars were involved and there was no information about the damage to the third car.

Dr. France said his lack of information simply created a greater need to "estimate." *Id.* at 149-150. He admitted the more things you don't know, the more guesses you have to make. The more guesses you make, the greater the error. *Id.* at 223. All things considered, the so called expert opinion of Dr. France as to the impact speed in this collision is simply a mountain of guesswork. *Id.* at 145-47, 149-150, 222-23.

D. Conclusion

Many years ago, our Supreme Court stated:

> In view of the importance of the function entrusted to the expert witness, it is of great importance that the court carefully scrutinize his qualifications to guard against being led astray by the pseudo learned or charlatan who may purvey erroneous or too positive opinions without sound foundation.

Webb v. Olin Mathieson Chemical Corp., 9 Utah 2d 275, 342 P.2d 1094 (Utah 1959).

This advice remains sound today. The true test of admissibility of an expert opinion should be its reliability. It is impermissible to allow a witness to "guess."

Dr. France's testimony should not have been allowed. He simply guessed to provide necessary information to reach his conclusions. Such testimony is unreliable as a matter of law. *Tittsworth v. Robinson, supra; Kofford v. Flora, supra; State v. Rimmasch, supra.* The expert in *Tittsworth* lacked data and had to make guesses. 475 S.E. 2d at 262-63. So did Dr. France in this case. The expert in *Tittsworth* never saw the cars involved in the crash. Like Dr. France, he did not have all of the damage information and used estimates to reach his conclusions. *Tittsworth* held that such evidence lacked a sufficient foundation and was speculative. *Id.* This court should make the same finding.

POINT V

THE EXPERT TESTIMONY OF JAYNE CLARKE WAS NOT ADMISSIBLE UNDER RULE 702 OF THE UTAH RULES OF EVIDENCE.

Prior to trial, the Prunedas filed a Motion in Limine seeking to exclude testimony of Dr. Clarke regarding the treatment received by the Prunedas from Dr. McClean. R. 114-15. The motion was briefed. R. 116-162, 349-439. The motion was argued and denied by the court. R. 463-65.

Dr. Clarke performed her medical examination using only medical records and documents provided by defendants. R. 775 at 34-36. She never examined any of the plaintiffs. R. 775 at 90, 107:19-22. At trial, Dr. Clarke testified that the Prunedas received too much chiropractic care. R. 775 at 51-65. The testimony of Dr. Clarke was received over numerous foundational objections by the Prunedas. R. 775 at 36, 37, 47, 57. Over objection, Dr. Clarke was allowed to testify, based on the report of Paul France, that the forces generated in the collision were minimal and compared to daily life activities. R. 775 at 36-37. Over objection, she was allowed to criticize Dr. McClean's medical records and treatment. R. 775 at 47-65.

Our Supreme Court has long held that practitioners in one medical specialty are not ordinarily competent to testify as experts on the standard of care applicable to practitioners in another specialty. *Arnold v. Curtis, supra*; *Astill v. Clark, supra; Chadwick v. Nielsen, supra; Dikeou v. Osborn, supra; Kent v. Pioneer Valley Hospital, supra.* The testimony of medical experts is specific to their particular specialty. A physician is not qualified to give an admissible opinion on the treatment provided by another physician unless the physician giving the opinion is shown to have familiarity with the treating physician's particular area of practice. *Butterfield v. Okubo, supra; Burton v. Youngblood, supra; Dikeou v. Osborn,*

supra; *Kent v. Pioneer Valley Hospital, supra.* Dr. Clarke had no such expertise regarding the practice of chiropractic medicine. In *Martin v. Mott, supra,* the Court held that the party offering a witness as an expert has a burden to establish the witness' knowledge and familiarity with the standard of care and treatment commonly practiced by physicians engaged in the other specialty.

While it is true that the trial court has broad discretion over the admission of expert testimony, the trial court's determination regarding the admissibility of expert testimony is reviewed under an abuse of discretion standard. *Dikeou v. Osborn, supra*; *Pack v. Case*, 30 P.3d 436, (Utah App. 2001).

Dr. Clarke admitted she has little or no training in chiropractic medicine. She is not a licensed chiropractor. R. 775 at 70-73. She admitted in her deposition to having little, if any, familiarity with the CAD treatment protocols adopted by the Utah Chiropractic Association. R. 775 at 82-83. Then at trial, she claimed to have expertise on these treatment protocols. R. 775 at 56-58. She was allowed to testify extensively that the treatment rendered by Dr. McClean was not appropriate and did not comply with CAD Protocols. R. 775 at 58-65.

The rationale for prohibiting an M.D. from scrutinizing treatment by an M.D. in a different specialty is more compelling when an M.D. seeks to scrutinize the care rendered by a chiropractor. There is nothing in the record from which one could infer that Dr. Clarke is trained in, or familiar with, the standard followed by chiropractors or their application of the treatment protocols adopted by their medical association. In fact, Dr.

Clarke testified she does not practice using the chiropractic method, that chiropractic medicine uses a different theory of healing, that chiropractors treat their patients differently than would an M.D., and that the number of appropriate treatments is not standardized. R. 775 at 70-74. Dr. Clarke testified that she became familiar with the CAD Protocols after her deposition and before trial. However, there was nothing in her testimony to indicate that she has the necessary knowledge or experience to give expert testimony on how a licensed chiropractor should apply the CAD Protocols in the treatment of patients. R. 775 at 81-84. Notwithstanding her limited knowledge of the CAD Protocols, she offered numerous opinions about Dr. McClean's treatment. She claimed an ability to expertly interpret the standards set out in the CAD Protocols and apply them to Dr. McClean's records. R. 775 at 57-58, 84-114, 124-131.

There was a total lack of any foundation for Dr. Clarke's opinions. Dr. Clarke never saw or examined any of the Prunedas. Her testimony was based solely upon a review of medical records and other written materials provided by the defense.

The admission of Dr. Clarke's testimony is governed by Rule 702. Defendants must show that Dr. Clarke has the background, training and experience in chiropractic medicine that would allow her to opine on the type and amount of chiropractic care rendered by Dr. McClean in this case. *Arnold v. Curtis, supra; Astill v. Clark, supra; Chadwick v. Nielsen, supra; Butterfield v. Okubo, supra; Burton v. Youngblood, supra; Martin v. Mott, supra.* She did not. R. 775 at 69-74, 81-92.

This type of speculative testimony is not admissible. *State v. Rimmasch, supra; State v. Mead, supra; Brewer, supra. See State v. Pendergrass, supra* (psychiatrist's testimony excluded because it relied upon too many unknown facts); *Ostler v. Aldina Transfer Co., Inc., supra.*

Dr. Clarke's opinions are unreliable because she based her opinions, in part, upon her evaluation of the truth or falsity of witness' statements. This is something scientific experts are specifically forbidden to do. In *Rimmasch, supra*, the court specifically held that an expert opinion, based in part on a determination that a certain witness is (or is not) telling the truth, is not admissible. 775 P.2d at 405-07.

Dr. Clarke relied upon a statement from the deposition of Anthony Guererro, which she claims contradicted the testimony of Dr. McClean and his medical records. Therefore, she concluded, Dr. McClean's medical records could not be believed. *See* R. 775 at 38-39, 58-62, 92-101, 125-27, 130-31.

She relied upon a statement of the mother, who works all day, that she didn't see the children exercising. Therefore, she concluded the children did not do their exercises and Dr. McClean was wrong to say the children exercised under supervision at the McClean Clinic and had reported to the doctor that they were doing their exercises. R. 775 at 125-27.

A close review of the testimony shows that Dr. Clarke has no real training in chiropractic treatment methods and theories of treatment. R. 70-72. Her limited familiarity with the CAD Protocols consisted solely of review of some summaries between the date of

her deposition and the trial. This is an insufficient foundation to allow her to testify that Dr. McClean's treatment was excessive and unnecessary. *Arnold v. Curtis, supra: Astill v. Clark, supra; Chadwick v. Nielsen, supra; Dikeou v. Osborn, supra; Kent v. Pioneer Valley Hospital, supra.*

In the *Dikeou* case, the Court dealt with the issue of whether an emergency room physician could testify regarding the treatment rendered by a cardiologist. In holding that the emergency room doctor had an insufficient foundation to testify regarding care given by the cardiologist, the Court stated:

> It is true that, ordinarily, a practitioner of one school of medicine is not competent to testify as an expert in a malpractice action against a practitioner of another school. In light of the wide variation between schools in both precepts and practices, as a general matter this rule makes good sense. It has been judicially adopted in a majority of states, and we follow it here.
> In a later case, the supreme court, while noting the general rule that "practitioners in one specialty are not ordinarily competent to testify as experts on the standard of care applicable in another specialty," clarified the exception to the general rule stated earlier in Youngblood :
> An exception is made when a witness is knowledgeable about the standard of care of another specialty or when the standards of different specialties on the issue in a particular case are the same. Thus, according to Youngblood and Arnold, a medical expert witness brought in to testify on the applicable standard of care, and whose specialty differs from that of the allegedly negligent doctor, must show that he or she is knowledgeable about the applicable standard of care or that the standard of care in the expert's specialty is the same as the standard of care in the alleged negligent doctor's specialty. 881 P.2d at 947. (citations omitted)(emphasis added)

After establishing this criteria for a physician in one specialty to testify regarding care and treatment given by a doctor in another specialty, the Court stated how the trial court's discretion should be exercised:

> In exercising that discretion, we believe a trial court should require a medical expert witness to demonstrate familiarity with the applicable standard of care based on more than just a review of the documents in the particular case. By definition, an expert is one who possesses a significant depth and breadth of knowledge on a given subject. To allow a doctor in one specialty, retained as an expert witness, to become an "expert" on the standard of care in a different medical specialty by merely reading and studying the documents in a given case invites confusion, error, and a trial fraught with unreliable testimony. *Id.* at 947 (citations omitted)(emphasis added).

The court then explained that before an expert can testify in a case, he must establish that he was knowledgeable in the field in which he proposes to give testimony before being retained as an expert witness. *Id. See Kent v. Pioneer Valley Hospital, supra.*

Dr. Clarke was similarly unable to establish such a background. She had no basis to critique Dr. McClean's treatment of the Prunedas. Her unfamiliarity with chiropractic medicine and its theories of healing, methods and treatment, and other standards precluded her from giving testimony about the care rendered by Dr. McClean. Her admission that her familiarity with the CAD treatment protocols came from a review of a summary of the CAD Protocols between her deposition and trial (R. 775 at 82-84) shows precisely the lack of foundation which the *Dikeou* and *Kent* courts held precluded the proposed expert from rendering an opinion.

The Utah Supreme Court has held that a trial judge has a critical "gatekeeping" responsibility, when expert opinions are proffered, to "ensure that offered opinions are not only relevant, but reliable." *State v. Crosby, supra; State v. Rimmasch, supra.* This role is critical because juries have a tendency to abandon their responsibility to decide the facts

and simply adopt the judgment of an expert despite their inability to accurately appraise the validity of reasons underlying the opinion. *State v. Rimmasch, supra.*

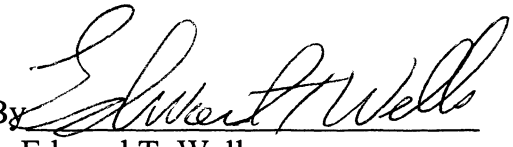
The trial court abused its discretion by allowing Dr. Clarke to give testimony criticizing the treatment given by Dr. McClean. *Kent v. Pioneer Valley Hospital, supra*; *Dikeou v. Osborn, supra.* The testimony of Dr. Clarke on the issues of the reasonableness and necessity of the care given by Dr. McClean; on the issues relating to the seriousness of the injuries suffered by the Prunedas; on the CAD Protocols and their application to the treatment of the Prunedas; and on the adequacy of the records kept by Dr. McClean; lacked the foundation required by law. *Id. See State v. Crosby, supra*; *State v. Rimmasch, supra; Astill v. Clark, supra; Chadwick v. Nielsen, supra; Butterfield v. Okubo, supra; Dikeou v. Osborn, supra; Kent v. Pioneer Valley Hospital, supra.*

CONCLUSION

Premises considered, this Court should reverse the verdict of the jury on general and special damages and remand this matter back to the trial court with instructions to grant plaintiffs' Motions in Limine regarding the testimony of Dr. France and Dr. Clarke, and to deny the Motion in Limine of defendants regarding expert testimony of Dr. McClean, and with instructions to grant a new trial on damage issues only, with instruction to the jury that if it awards special damages of $3,000.00 or more, general damages, in more than a nominal amount must be awarded.

Respectfully submitted this 26th day of January, 2007.

Mel. S. Martin, P.C.

By 
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Certificate of Hand Delivery

I certify that on the 26th day of January, 2007, I hand delivered two copies of Appellants' Brief in the above matter to the following:

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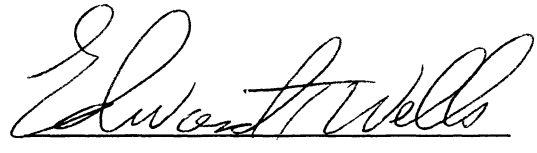

ADDENDUM

XI

ADDENDUM

Index

EXHIBIT 1

Statutes and Rules

Utah Code Ann. Section 31A-22-309 (Supp. 2001)

2. Persons covered generally

Whether employee is entitled to personal injury protection (PIP) benefits cannot turn on employer's decision to secure private insurance or to self-insure. U.C.A.1953, 41-12a-407(2). Neel v. State, 1995, 889 P.2d 922. Insurance ⚿ 2660

3. Family and household members

Father of deceased passenger was not entitled to personal injury protection coverage under the driver's policy where passenger was not a relative of the driver's family who resided with them nor was he killed while riding in a vehicle which was insured by driver's insurer. U.C.A. 1953, 31A-22-308. McCaffery for and on Behalf of McCaffery v. Grow, 1990, 787 P.2d 901. Insurance ⚿ 2661

4. Governmental vehicles

Although state's self-insurance program excludes personal injury protection (PIP) benefits to any person entitled to workers' compensation benefits, this exclusion is not in harmony with statutory requirements and is, therefore, invalid. U.C.A.1953, 31A-22-309(3)(a). Neel v. State, 1995, 889 P.2d 922. Insurance ⚿ 2847

Action brought against state by passenger injured in state-owned vehicle to recover personal injury protection benefits was contractual in nature, making procedural requirements of Governmental Immunity Act inapplicable. U.C.A.1953, 31A-1-301(48)(a), 31A-22-302, 31A-22-307, 31A-22-308(3), 31A-22-309(5), 41-12a-103(9), 41-12a-301(3), 41-12a-406(2), 41-12a-407(1), 63-30-5(1), 63-30-19. Neel v. State, 1993, 854 P.2d 581. States ⚿ 197

5. Workers' compensation benefits

Where automobile accident is covered by both workers' compensation and no-fault insurance, statute providing that personal injury protection (PIP) benefits are payable to injured employee but are reduced by benefits which he receives under workers' compensation permits no-fault insurer to exclude some liability, that which is compensable under workers' compensation, but not all liability; overruling IML Freight, Inc. v. Ottosen, 538 P.2d 296. U.C.A.1953, 31A-22-309(3)(a). Neel v. State, 1995, 889 P.2d 922. Insurance ⚿ 2847

No-fault insurers, including self-insurers, are required to pay personal injury protection (PIP) benefits to injured employees to extent that those benefits exceed workers' compensation benefits. Neel v. State, 1995, 889 P.2d 922. Insurance ⚿ 2847

6. Costs and attorney fees

Insurer of pedestrian who was struck and injured by tractor-trailer was not entitled to award of prejudgment interest and attorney fees in its breach of contract action against insurer for trucking company that owned tractor-trailer, after trucking company's insurer refused to reimburse pedestrian's insurer for personal injury protection (PIP) benefits; pedestrian, as person entitled to benefits, never submitted claim for PIP benefits to trucking company's insurer, and even if pedestrian had submitted claim for benefits, it would have been her personal remedy to pursue action for prejudgment interest and attorney fees, not her insurer's remedy. U.C.A. 1953, 31A-22-308, 31A-22-309(5). Regal Ins. Co. v. Canal Ins. Co., 2002, 42 P.3d 387, 440 Utah Adv. Rep. 19, 2002 UT App 27, certiorari granted 48 P.3d 979, affirmed 93 P.3d 99, 494 Utah Adv. Rep. 23, 2004 UT 19. Insurance ⚿ 3585; Interest ⚿ 39(2.35)

§ 31A-22-309. Limitations, exclusions, and conditions to personal injury protection

(1)(a) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

(i) death;

(ii) dismemberment;

(iii) permanent disability or permanent impairment based upon objective findings;

(iv) permanent disfigurement; or

(v) medical expenses to a person in excess of $3,000.

(b) Subsection (1)(a) does not apply to a person making an uninsured motorist claim.

(2)(a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the insured while occupying another motor vehicle owned by or furnished for the regular use of the insured or a resident family member of the insured and not insured under the policy,

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle;

(iii) to any injured person, if the person's conduct contributed to his injury:

(A) by intentionally causing injury to himself; or

(B) while committing a felony;

(iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

(v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or

(vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials.

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.

(3) The benefits payable to any injured person under Section 31A-22-307 are reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan; and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because that person is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.

(5)(a) Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as expenses are incurred.

(b) Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer.

(c) If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1-½% per month after the due date.

(d) The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

(6) Every policy providing personal injury protection coverage is subject to the following:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund created under Chapter 33, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

Laws 1985, c. 242, § 27; Laws 1986, c. 204, § 160; Laws 1988, 2nd Sp. Sess., c. 10, § 10; Laws 1991, c. 74, § 8; Laws 1992, c. 230, § 9; Laws 1994, c. 4, § 1; Laws 2000, c. 222, § 5, eff. May 1, 2000; Laws 2001, c. 59, § 3, eff. April 30, 2001.

Historical and Statutory Notes

Complementary Legislation:

Ark.—A.C.A. §§ 23-89-201 to 23-89-214.
Colo.—West's C.R.S.A. §§ 10-4-701 to 10-4-723.
Conn.—C.G.S.A. § 38a-363 et seq.
D C.—D.C. Official Code, 2001 Ed. §§ 31-2401 to 31-2413.
Fla.—West's F.S.A. §§ 627.730 to 627.7405.
Ga.—O.C.G.A. §§ 33-34-1 to 33-34-8.
Hawaii—H R S §§ 431:10C-101 to 431:10C-121.
Kan.—K.S.A. 40-3101 to 40-3121.
Ky.—KRS 304.39-010 to 304.39-350.
Md.—Code, Insurance, §§ 19-501 to 19-516.
Mass.—M.G.L.A. c. 90, §§ 34A, 34D, 34M, 34N, 34O; c. 175, § 113B.
Mich.—M.C.L.A. §§ 500.3101 to 500.3179.
Minn.—M.S.A. §§ 65B.41 to 65B.71.
N.J.—N.J.S.A. 39:6A-1 et seq.
N.Y.—McKinney's Insurance Law, §§ 5101 to 5108.
N.D.—NDCC 26.1-41-01 to 26.1-41-20.
Ore.—ORS 742.520 to 742.544.
Pa.—75 Pa.C.S.A. § 1791 to 1799.7.
S.C.—Code 1976, § 38-77-10 et seq.
Utah—U.C.A. 1953, 31A-22-309.

Cross References

No-fault tort immunity ineffective, see § 41-12a-304.
Uniform Arbitration Act, see § 78-31a-101 et seq.

Law Review and Journal Commentaries

Barrus, *Allstate Insurance Co. v. Ivie*: Reimbursement Between Insurers Under Utah's No-Fault Act, 1981 Utah L. Rev. 379 (1981).

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ALR Library

33 A.L.R.5th 303, Intoxication of Automobile Driver as Basis for Awarding Punitive Damages.
23 A.L.R.5th 241, Excessiveness or Inadequacy of Attorney's Fees in Matters Involving Commercial and General Business Activities.
33 A.L.R.4th 767, What Constitutes Sufficiently Serious Personal Injury, Disability, Impairment, or the Like to Justify Recovery of Damages Outside of No-Fault Automobile Insurance Coverage.

Utah Code Ann. Section 78-2-2

otherwise unable to serve, the associate chief justice shall serve as chief justice. The chief justice may delegate responsibilities to the associate chief justice as consistent with law.

Laws 1951, c. 58, § 1; Laws 1969, c. 247, § 1; Laws 1986, c. 47, § 40; Laws 1988, c. 248, § 4; Laws 1990, c. 80, § 4.

Codifications C. 1943, Supp., § 104–2–1.

Cross References

Judges Contributory Retirement Act, see § 49–17–101 et seq.
Judges Noncontributory Retirement Act, see § 49–18–101 et seq.
Supreme court, generally, see Const. Art. 8, § 2.
Supreme court jurisdiction, see Const. Art. 8, § 3.

Library References

Courts ⇐48.
Judges ⇐3, 1.
Westlaw Key Number Searches: 106k48; 227k3; 227k1.
C.J.S. Courts § 4.
C.J.S. Judges §§ 2 to 7, 12 to 13.

§ 78–2–1.5. Repealed by Laws 1971, c. 182, § 4

§ 78–2–1.6. Repealed by Laws 1981, c. 267, § 2, eff. July 1, 1982

§ 78–2–2. Supreme Court jurisdiction

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the School and Institutional Trust Lands Board of Trustees;

(iv) the Board of Oil, Gas, and Mining;

(v) the state engineer; or

(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Laws 1986, c. 47, § 41; Laws 1987, c. 161, § 303; Laws 1988, c. 248, § 5; Laws 1989, c. 67, § 1; Laws 1992, c. 127, § 11; Laws 1994, c. 191, § 2; Laws 1995, c. 267, § 5, eff. May 1, 1995; Laws 1995, c. 299, § 46, eff. May 1, 1995; Laws 1996, c. 159, § 18, eff. July 1, 1996; Laws 2001, c. 302, § 1, eff. April 30, 2001.

Cross References

Extraordinary writs, judicial code, see § 78–35–1 et seq.
Mandamus and prohibition, see § 78–35–9.
Supreme court jurisdiction over extraordinary writs, see § 78–2–2.
Supreme court jurisdiction, see § 78–2–2.

Library References

Administrative Law and Procedure ⇐651 to 686, 721 to 726.
Certiorari ⇐9.
Courts ⇐248, 206(17.4), 207, 485.
Westlaw Key Number Searches: 106k248; 106k206(17.4); 106k207; 106k485; 73k9; 15Ak651 to 15Ak686; 15Ak721 to 15Ak726
C.J.S. Certiorari §§ 7 to 8.

Rule 26(a)(3), Utah Rules of Civil Procedure

Note 9

Suggestion of death of party to lawsuit, filing of which will begin 90-day period during which motion for substitution must be filed in order to avoid dismissal, need not be served on unidentified nonparties. Rules Civ.Proc., Rule 25(a)(1). Stoddard v. Smith, 2001, 27 P.3d 546, 423 Utah Adv. Rep. 10, 2001 UT 47. Parties ⚿ 60

Plaintiff, who had 53 days to file for letters of administration after time allowed for deceased defendant's relatives to petition for such letters had expired but who made no request for probate of estate and did not ask for enlargement of 90-day period for moving for substitution of parties, was not in position to complain of any conflict between rule, which provides that action shall be dismissed as to deceased party unless motion for substitution is made within 90 days, and Probate Code provision giving next of kin three months to apply for letters of administration before others may apply. Rules of Civil Procedure, rules 6(b), 25(a); U.C.A.1953, 75–4–1, 75–4–3. Connelly v. Rathjen, 1976, 547 P.2d 1336. Abatement And Revival ⚿ 74(1)

10. Dismissal

Failure of automobile accident victim who brought personal injury action against two others related to accident, to file motion to substitute defendants within 90 days after date on which attorney who had represented one defendant filed suggestion of death was sufficient basis to dismiss complaint with prejudice. Rules Civ.Proc., Rule 25. Donahue v. Smith, 2001, 27 P.3d 552, 423 Utah Adv. Rep. 7, 2001 UT 46. Pretrial Procedure ⚿ 556.1

Dismissal of personal injury action for failure to timely substitute proper party after attorney who had represented defendant filed suggestion of death was presumed to be with prejudice, even though Rule of Civil Procedure provided that dismissal for lack of indispensable party would be considered dismissal without prejudice, where provision referred only to dismissal under Rule allowing dismissal of action when necessary party was not joined, dismissal for lack of substitution was governed by separate Rule allowing dismissal with prejudice, and judgment did not indicate that dismissal was without prejudice. Rules Civ.Proc., Rules 19(b), 25, 41(b). Donahue v. Smith, 2001, 27 P.3d 552, 423 Utah Adv. Rep. 7, 2001 UT 46. Pretrial Procedure ⚿ 690

Under Rule of Civil Procedure governing dismissal of actions, district court was not required to dismiss personal injury complaint with prejudice for failure to timely substitute defendant after attorney who had represent defendant filed suggestion of death, given that Rule provided only that, unless court in dismissal order provided otherwise, dismissal operated as adjudication upon merits. Rules Civ.Proc., Rules 25, 41(b). Donahue v. Smith, 2001, 27 P.3d 552, 423 Utah Adv. Rep. 7, 2001 UT 46. Pretrial Procedure ⚿ 690

11. Review

Absent an abuse of discretion, reviewing court will affirm district court order denying motion to extend the time for filing motion for substitution of party. Rules Civ.Proc., Rules 6, 25. Stoddard v. Smith, 2001, 27 P.3d 546, 423 Utah Adv. Rep. 10, 2001 UT 47. Appeal And Error ⚿ 949

Whether district court properly dismissed complaint based on plaintiff's failure to make a motion for substitution within 90 days after defendant's law firm filed a suggestion of death following death of defendant during pendency of litigation presented a question of law subject to review for correctness. Rules Civ.Proc., Rule 25. Stoddard v. Smith, 2001, 27 P.3d 546, 423 Utah Adv. Rep. 10, 2001 UT 47. Appeal And Error ⚿ 842(1)

PART V. DEPOSITIONS AND DISCOVERY

Cross References

Arbitration in third party motor vehicle accident cases, discovery conducted in accordance with this part, see § 31A–22–321.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Required disclosures; Discovery methods.

(a)(1) *Initial disclosures.* Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or

defenses, unless solely for impeachment, identifying the subjects of the information;

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) *Exemptions.*

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is $20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iv) to enforce an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to the practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(a)(3) *Disclosure of expert testimony.*

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) *Pretrial disclosures.* A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) *Form of disclosures.* Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) *Methods to discover additional matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(b)(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b)(2) *Limitations.* The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(b)(3) *Trial preparation: Materials.* Subject to the provisions of Subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement

Rule 702, Utah Rules of Evidence

Note 6

1015, 406 Utah Adv. Rep. 3, 2000 UT App 285, certiorari denied 20 P.3d 403. Evidence ⚿ 478(1)

Mother was not unqualified to testify with respect to gestation period, since her estimation as to period of gestation was both rationally based upon her own perception and helpful to clear understanding of length of term of her child. Rules of Evid., Rule 56. Roods v. Roods, 1982, 645 P.2d 640. Evidence ⚿ 474(1)

7. Product liability

In products liability suit arising out of child's death on all-terrain vehicle, district court could exclude proffered testimony of decedent's mother as to whether she would have allowed her son to ride vehicle had it had different warning on it. Fed.Rules Evid.Rule 701(a), 28 U.S.C.A. Kloepfer v. Honda Motor Co., Ltd., 1990, 898 F.2d 1452. Evidence ⚿ 501(9)

8. Performance or breach of contract

In buyer's counterclaim for breach of warranty in conditional seller's action to replevy bread-slicing and bread-wrapping machines, testimony as to amount of paper wasted because of rewraps necessary, or as to number of "cripples" per day produced by machine, held not inadmissible as matters of opinion or conclusions. Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co., 1934, 88 Utah 67, 39 P.2d 323. Evidence ⚿ 471(25)

9. Review

Admission of alleged lay and expert handwriting evidence to challenge easement conveyance document certified by a notary public allegedly acting as a "subscribing witness" was not plain error, as any error would not have been obvious to the trial court; statute did not define "subscribing witness," notary could not state with certainty that she personally witnessed the execution of the deed, and Supreme Court case which held that a notary who personally witnesses the execution of a deed may be a subscribing witness was only case to address issue in over 100 years. Berkshires, L.L.C. v. Sykes, 2005, 541 Utah Adv. Rep. 8, 2005 WL 3434444. Appeal And Error ⚿ 204(7)

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Advisory Committee Note

This rule is the federal rule, verbatim. Rule 56(2), Utah Rules of Evidence (1971), was substantially the same.

Cross References

Disclosure of witnesses to be used at trial, see Rules Civ. Proc., Rule 26.

Law Review and Journal Commentaries

Anderson, *United States v. Azure*: Admissibility of Expert Testimony in Child Sexual Abuse Cases, 15 J. Contemp. L. 285 (1989).

Breyer, The Battered Woman Syndrome and the Admissibility of Expert Testimony in Utah, 5 Utah B.J. 16 (March 1992).

Hale, Eyewitness Identification in Utah: A Changing Perspective, 1988 Utah L. Rev. 113 (1988).

Lewis and Knight-Eagan, "Making New Law With a Joyous Frenzy"-The State of the Law on Expert Testimony in Utah, 3 Utah B.J. 14 (June/July 1990).

Mundt-Larsh, *State v. Rimmasch*: Utah's Threshold Admissibility Standard for Child Sexual Abuse Profile Evidence, 1990 Utah L. Rev. 641 (1990).

Poulter, *Daubert* and Scientific Evidence: Assessing Evidentiary Reliability in Toxic Tort Litigation, 1993 Utah L. Rev. 1307 (1993).

Recent developments in Utah law: III. Evidence law. Distinguishing between expert and lay testimony, 2005 Utah L. Rev. 230 (2005).

Schofield, A Misapplication of *Daubert*: *Compton v. Subaru of America* Opens the Gate for Unreliable and Irrelevant Testimony, 1997 B.Y.U. L. Rev. 489 (1997).

Walden, *United States v. Downing*: Novel Scientific Evidence and the Rejection of *Frye*, 1986 Utah L. Rev. 839 (1986).

EXHIBIT 2

Ruling on Motions in Limine

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IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

SERGIO PRUNEDA AND IRIS PRUNEDA, AS PARENTS AND GUARDIANS OF ANTHONY GUERRERO, DONOVAN GUERRERO, SERGIO PRUNEDA, JR., COZY PRUNEDA, MATTHEW PRUNEDA AND ZENNIA PRUNEDA, MINOR CHILDREN, Plaintiffs, vs. COLUMBIA STEEL CASGINT CO., INC., AN OREGON CORPORATOIN AND RICHARD D. GRAY, Defendants.	**ORDER RE: PLAINTIFFS' MOTIONS IN LIMINE REGARDING DEFENDANT'S EXPERTS, PAUL FRANCE AND DR. JAYNE CLARK** **Civil No.: 030402552** **Honorable Fred D. Howard**

On May 20, 2005, oral argument was heard on Plaintiffs' Motions in Limine regarding Defendant's experts, Paul France and Dr. Jayne Clark. Having heard oral argument and reviewing the memoranda filed by the parties,

IT IS HEREBY ORDERED as follows:

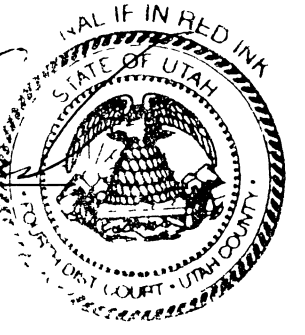
1. Defendant's Motion in Limine regarding expert Paul France is denied. However, the Court will allow the Plaintiffs to conduct an evidentiary hearing at the trial, out of the presence of the jury, regarding the foundation for Paul France's opinions.

2. Plaintiff's Motion in Limine regarding Defendant's expert, Dr. Jayne Clark, is denied.

3. The Court will hold a telephone scheduling conference on July 15, 2005 at 8:30 at which time a date will be set for a three day jury trial.

DATED this 20 day of June, 2005.

BY THE COURT:



Honorable Fred D. Howard
Fourth District Court Judge

APPROVED AS TO FORM:

Mel S. Martin
Edward T. Wells
Attorneys for Plaintiffs

EXHIBIT 3

Special Verdict

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

SERGIO PRUNEDA AND IRIS PRUNEDA, AS PARENTS AND GUARDIANS OF ANTHONY GUERRERO, DONOVAN GUERRERO, SERGIO PRUNEDA, JR., COZY PRUNEDA, MATTHEW PRUNEDA AND ZENNIA PRUNEDA, MINOR CHILDREN, Plaintiffs, **vs.** COLUMBIA STEEL CASTING CO., INC., AN OREGON CORPORATION AND RICHARD D. GRAY, Defendants.	**SPECIAL VERDICT** **Civil No.: 030402552** **Honorable Fred D. Howard**

MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes". If you find the evidence so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No". Any damages assessed must also be proven by a preponderance of the evidence.

1. Was the defendant, Richard D. Gray, negligent as alleged by the plaintiffs?

Yes ✓ No ____

2. Was the negligence of Richard D. Gray a proximate cause of the injuries alleged by the plaintiffs?

Yes ✓ No ____

If you answered questions 1 or 2 "No", do not proceed any further. Instead, have the foreman sign the Special Verdict and inform the bailiff that you have reached a verdict. If you answered "Yes" to questions 1 and 2, then, and only then, proceed to the next question.

3. Was the plaintiff, Sergio Pruneda, contributorily negligent as alleged by the defendants?

Yes ____ No ✓

4. Was the negligence of Sergio Pruneda a proximate cause of the injuries alleged by the plaintiffs?

Yes ____ No ____

5. Assuming all of the negligence that proximately caused the plaintiffs' injuries to total 100%, what percentage of that negligence is attributable to:

a. Plaintiff, Sergio Pruneda ____%

b. Defendant, Richard D. Gray ____%

c. Total 100 %

6.a. Did plaintiff, Sergio Pruneda, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes ✓ No ____

6.b. If you answered question 6.a. "yes", state the amount of special damages.

Special Damages: $ 4,763.07

If, and only if, the amount of special damages is $3,000 or more, then state the amount of general damages, if any, you award.

General Damages: $ 0

7.a. Did plaintiff, Anthony Guerrero, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes ✓ No ____

7.b. If you answered question 7.a. "yes", state the amount of special damages.

Special Damages: $ 2200

If, and only if, the amount of special damages is $3,000 or more, then state the amount of general damages, if any, you award.

General Damages: $ 0

8.a. Did plaintiff, Donovan Guerrero, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes ✓ No ____

8.b. If you answered question 8.a. "yes", state the amount of special damages.

Special Damages: $ 220.00

If, and only if, the amount of special damages is $3,000 or more, then state the amount of general damages, if any, you award.

General Damages: $ 0

9.a. Did plaintiff, Sergio Pruneda, Jr., sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes ✓ No ____

9.b. If you answered question 9.a. "yes", state the amount of special damages.

Special Damages: $ 220.00

If, and only if, the amount of special damages is $3,000 or more, then state the amount of general damages, if any, you award.

General Damages: $ 0

10.a. Did plaintiff, Cozy Pruneda, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes ✓ No ____

10.b. If you answered question 10.a. "yes", state the amount of special damages.

Special Damages: $ 220.00

If, and only if, the amount of special damages is $3,000 or more, then state the amount of general damages, if any, you award.

General Damages: $ 0

11.a. Did plaintiff, Matthew Pruneda, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes ✓ No ____

11.b. If you answered question 11.a. "yes", state the amount of special damages.

Special Damages: $ 220.00

12. Did plaintiff, Zennia Pruneda, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes ✓ No ____

12.b. If you answered question 12.a. "yes", state the amount of special damages.

Special Damages: $ 220.00

DATED this 20 day of April, 2006.

BSumell

Foreperson

EXHIBIT 4

Judgment

Edward T. Wells, (Bar No. 3422)
Mel S. Martin (Bar No. 2102)
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Attorney for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF UTAH, STATE OF UTAH

SERGIO PRUNEDA, and IRIS PRUNEDA as parent and guardian of DONOVAN GUERRERO, ANTHONY GUERRERO, SERGIO PRUNEDA, JR., COZY PRUNEDA, MATTHEW PRUNEDA, and ZENNIA PRUNEDA, Minor Children. Plaintiffs, vs. COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, and RICHARD D. GRAY, Defendants.	**JUDGMENT** Civil No. 030402552 Judge Fred D. Howard

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This action was tried to a jury, the Honorable Fred D. Howard presiding, on April 17-20, 2006. Plaintiffs were present and represented by their attorney, Edward T. Wells, and

defendants were present and represented by their attorney, Peter H. Christensen. At the close of evidence, jury instructions and closing arguments, the jury entered a verdict answering questions as follows on the Special Verdict form:

1. Was the Defendant Richard D. Gray, negligent as alleged by the plaintiffs?

   Yes __X__ No _____

2. Was the negligence of Richard D. Gray a proximate cause of the injuries alleged by the plaintiffs?

   Yes __X__ No _____

3. Was the plaintiff, Sergio Pruneda, contributorily negligent as alleged by the defendants?

   Yes _____ No __X__

4. Was the negligence of Sergio Pruneda a proximate cause of the injuries alleged by plaintiffs?

   Yes _____ No _____

5. Assuming all of the negligence that proximately caused the plaintiffs' injuries to total 100%, what percent of that negligence is attributable to :

   a. Plaintiff, Sergio Pruneda _____%

   b. Defendant, Richard D. Gray _____%

   c. Total 100%

6a. Did plaintiff, Sergio Pruneda, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes _X_ No __

6b. If you answered question 6a "Yes", state the amount of special damages.

Special Damages: $4,762.07.

If, and only if, the amount of special damages is $3,000 or more, then state the amount of general damages, if any, you award.

General Damages: $ 0

7a. Did plaintiff, Anthony Guerrero, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes _X_ No __

7b. If you answered question 6a "Yes", state the amount of special damages.

Special Damages: $220.00.

If, and only if, the amount of special damages is $3,000 or more, then state the amount of general damages, if any, you award.

General Damages: $_____

8a. Did plaintiff, Donovan Guerrero, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes _X_ No __

8b. If you answered question 6a "Yes", state the amount of special damages.

Special Damages: $220.00.

If, and only if, the amount of special damages is $3,000 or more, then state the amount of general damages, if any, you award.

General Damages: $_____

9a. Did plaintiff, Sergio Pruneda, Jr., sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes _X_ No ___

9b. If you answered question 6a "Yes", state the amount of special damages.

Special Damages: $220.00.

If, and only if, the amount of special damages is $3,000 or more, then state the amount of general damages, if any, you award.

General Damages: $_____

10a. Did plaintiff, Cozy Pruneda, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes _X_ No ___

10b. If you answered question 6a "Yes", state the amount of special damages.

Special Damages: $220.00.

11a. Did plaintiff, Matthew Pruneda, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes _X_ No ___

11b. If you answered question 6a "Yes", state the amount of special damages.

Special Damages: $220.00.

12a. Did plaintiff, Zennia Pruneda, sustain reasonable and necessary medical expenses as a result of the automobile accident of July 31, 2002?

Yes _X_ No ___

12b. If you answered question 6a "Yes", state the amount of special damages.

Special Damages: $220.00.

The special verdict was returned, dated and signed by the jury foreman.

~~The jury was polled, indicating the verdict was unanimous. Over the objection of the plaintiffs, the jury was released.~~

The court finds that plaintiff is entitled to recover prejudgment interest pursuant to Utah Code Annotated § 78-27-44 on special damages actually incurred as assessed by the jury herein at the statutory rate of ten percent (10%) per annum from the date of injury (July 31, 2002) to the date of entry of judgment.

The court further finds that interest at ten percent per annum from July 31, 2002 on the jury's award of special damages incurred by Sergio Pruneda, in the sum of $4762.07 through April 24, 2006, is the amount of $1,778.28.

The court further finds that interest at ten percent per annum from July 31, 2002 on the jury's award of special damages incurred by Donovan Guerrero, Anthony Guerrero, Sergio Pruneda Jr., Cozy Pruneda, Matthew Pruneda and Zennia Pruneda, in the sum of $220.00 each, through April 25, 2006, is the sum of $82.15 each.

The parties stipulated at trial that any amount awarded against defendant Richard D. Gray, would also be entered against defendant Columbia Steel Casting Company.

NOW, THEREFORE, judgment is entered against defendants and in favor of plaintiffs as follows:

1. Judgment is entered against defendants and in favor of plaintiff, Sergio Pruneda in the amount of $4,762.07, together with prejudgment interest pursuant to Utah Code Annotated § 78-27-44 in the sum of $1,778.28 for a total judgment in favor of Sergio Pruneda of $6,540.35.

2. Judgment is entered against defendants and in favor of plaintiffs, Donovan Guerrero, Anthony Guerrero, Sergio Pruneda Jr., Cozy Pruneda, Matthew Pruneda and Zennia Pruneda in the amount of $220.00 each, together with prejudgment interest pursuant to Utah Code Annotated § 78-27-44 in the sum of $82.15 each for a total judgment in favor of Donovan

Guerrero, Anthony Guerrero, Sergio Pruneda Jr., Cozy Pruneda, Matthew Pruneda and Zennia Pruneda of $1,812.90.

3. The total Judgment in favor of Plaintiffs and against Defendants is the sum of $8,353.25

4. Costs are awarded to plaintiff in the amount of $ 3,163.50

Said judgment to accrue interest at the rate of 6.85% per annum and be subject to costs of collection of the judgment from the date of judgment until paid in full.

Dated this 30 day of May, 2006.

By the Court:

Honorable Fred D. Howard
District Judge

Approved as to Form

Peter H. Christensen, Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2006, I caused to be mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing **JUDGMENT** to

Peter H. Christensen
Strong & Hanni
3 Triad Center, #500
Salt Lake City, Utah 84180

Copy Faxed to (801) 596-1508

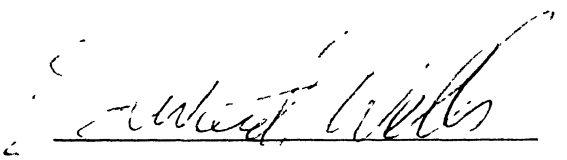

EXHIBIT 5

Unredacted Medical Records

MCCLEAN CHIROPRACTIC CLINIC
PATIENT NOTES

GORDON M MCCLEAN, JR D C , DABCO

PATIENT: Anthony Pruneda DOB: 1/6/92
Resolved lumbar sprain grade I

Assessment:
It appears that this patient has reached MMI for injuries related to the automobile accident of July 31, 2002 and will be released from care with no residuals. GMM

MCCLEAN CHIROPRACTIC CLINIC
PATIENT NOTES

GORDON M. MCCLEAN, JR. D.C., DABCO

PATIENT: Donavan Pruneda DOB: 12/05/90
Examination:
DTRs were 2 symmetrically in the upper extremities. Cervical ROM was wnl. Jackson's test was negative right and left. Shoulder Depression test was negative right and left. Cervical Compression test was negative right and left. Palpation was negative for pain in the cervical and thoracic regions. Myospasm was also negative in the cervical and thoracic regions. Percussion was negative in the cervical and thoracic regions. Muscle strength was 5/5 for the upper extremities. Sensory tests were normal for the upper extremities. In the lumbar region, DTRs were 2 symmetrically for the lower extremities. SLR was negative right and left. Bechterew's test was negative right and left. Milgrams test was negative. Minor's Sign was negative. Kemp's test was negative right and left. Heel Walk and Toe Walk were negative right and left. Palpation was normal in the lumbar region. Myospasm was negative in the lumbar region. Percussion was negative in the lumbar region. Lumbar ROM was normal. Muscle strength was 5/5 for the lower extremities. Sensory tests were normal for the lower extremities.

Diagnosis Update:
Resolved cervical sprain grade II
Resolved thoracic sprain grade I
Resolved lumbar sprain grade I

Plan:
Patient has reached MMI for injuries related to the automobile accident of July 31, 2002 and will be released from care with no residuals or partial permanent impairment. GMM

MCCLEAN CHIROPRACTIC CLINIC
PATIENT NOTES

GORDON M. MCCLEAN, JR. D.C., DABCO

PATIENT: Pruneda Cozy DOB: 06/23/96
04/02/03
Patient is doing about the same as last visit. CTO GMM

04/04/03
Patient reports mild thoracolumbar discomfort especially if sitting for long periods of time. Palpation is mildly tender in the paraspinal regions. CTO GMM

04/28/03
Patient is doing well with minimal discomfort in the thoracolumbar region. Patient is able to perform normal ADLs with little discomfort. He reports sitting will sometimes make him a little stiff and sore; otherwise he is doing well. Palpation is minimally tender on right thoracolumbar paraspinal muscles. Mild end point tenderness on lumbar extension. See in two weeks. CTO GMM

05/12/03
Patient reports he is feeling good with no particular pain but just a little tightness in between the scapula today. Sitting will occasionally irritate the region.

Examination:
Cervical ROM is normal. Palpation is not tender in the cervical region or thoracic region. No myospasm is present in the cervical or thoracic regions. Cervical Orthopedic tests were negative. In the lumbar region palpation was negative L1-5. No parapsinal myospasm was noted. DTRs were 2 symmetrically for the lower extremities. Orthopedic tests such as SLR and Bechterews were negative right and left. Lumbar ROM of was within normal limits with no end point tenderness. Muscle strength was 5/5 for the lower extremities. Sensory tests were normal for the lower extremities.

Diagnosis Update:
Resolved cervical sprain grade II
Resolved thoracic sprain grade I
Resolved lumbar sprain grade I

Assessment:
Overall, the patient is doing well with no particular symptoms. He is able to perform normal activities of daily living. The patient has reached MMI for injuries related to the automobile accident on July 31, 2003 and will be released from care with no residuals. GMM

MCCLEAN CHIROPRACTIC CLINIC
PATIENT NOTES

GORDON M MCCLEAN, JR D.C , DABCO

PATIENT: Matthew Pruneda DOB: 03/23/94
11/25/02
Similar symptoms as to last visit, CTO GMM

12/09/02
Patient is doing well with no particular problems. Palpation is not tender in the cervical or thoracic regions. Cervical ROM is wnl.

Assessment:
Patient has reached MMI for injuries related to the auto accident with no residuals.

Plan:
Release patient from care for injuries related to the auto accident. CTO GMM

EXHIBIT 6

F.R.C.P Rule 26 excerpt of committee comments to 1993 amendments

2006 Revised Edition

Supersedes 2006 Edition

Federal
CIVIL JUDICIAL PROCEDURE and RULES

Includes Proposed Rules for:

- FEDERAL RULES OF CIVIL PROCEDURE
- RULES OF EVIDENCE
- FEDERAL RULES OF APPELLATE PROCEDURE

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ics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence—as well as other items relating to conduct of trial—may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated—*e.g.*, change of testimony.

Listing a witness does not obligate the party to secure t attendance of the person at trial, but should preclude t party from objecting if the person is called to testify l another party who did not list the person as a witne

Subparagraph (B) requires the party to indicate which these potential witnesses will be presented by deposition trial. A party expecting to use at trial a deposition n recorded by stenographic means is required by revised Ru 32 to provide the court with a transcript of the pertine portions of such depositions. This rule requires that copi of the transcript of a nonstenographic deposition be provid to other parties in advance of trial for verification, an obvio concern since counsel often utilize their own personnel prepare transcripts from audio or video tapes. By order local rule, the court may require that parties designate t particular portions of stenographic depositions to be used trial.

Subparagraph (C) requires disclosure of exhibits, includi summaries (whether to be offered in lieu of other document ry evidence or to be used as an aid in understanding su evidence), that may be offered as substantive evidence. T rule requires a separate listing of each such exhibit, though should permit voluminous items of a similar or standardiz character to be described by meaningful categories. F example, unless the court has otherwise directed, a series vouchers might be shown collectively as a single exhibit w their starting and ending dates. As with witnesses, t exhibits that will probably be offered are to be listed sep rately from those which are unlikely to be offered but wh are listed in order to preserve the right to do so if neec because of developments during trial. Under revised Ru 37(c)(1) the court can permit use of unlisted documents t need for which could not reasonably have been anticipated advance of trial.

Upon receipt of these final pretrial disclosures, otl parties have 14 days (unless a different time is specified the court) to disclose any objections they wish to preserve the usability of the deposition testimony or to the admissil ty of the documentary evidence (other than under Rules and 403 of the Federal Rules of Evidence). Similar pro sions have become commonplace either in pretrial orders by local rules, and significantly expedite the presentation evidence at trial, as well as eliminate the need to h available witnesses to provide "foundation" testimony most items of documentary evidence. The listing of a pot tial objection does not constitute the making of that object or require the court to rule on the objection; rather preserves the right of the party to make the objection w and as appropriate during trial. The court may, howe elect to treat the listing as a motion "in limine" and rule u the objections in advance of trial to the extent appropri

The time specified in the rule for the final pretrial dis sures is relatively close to the trial date. The objective i eliminate the time and expense in making these disclosu of evidence and objections in those cases that settle sho before trial, while affording a reasonable time for f preparation for trial in those cases that do not settle. many cases, it will be desirable for the court in a schedu or pretrial order to set an earlier time for disclosures evidence and provide more time for disclosing poter objections.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.